

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,) **Case No. 3:15-CR-00496-L**
)
Plaintiff,)
) Dallas, Texas
v.) July 20, 2017
) 10:00 a.m.
USPLABS, LLC, et al.,)
) MOTIONS
Defendants.)
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RENEE HARRIS TOLIVER,
UNITED STATES MAGISTRATE JUDGE.

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1 DALLAS, TEXAS - JULY 20, 2017 - 10:02 A.M.

2 THE COURT: This is Case No. 3:15-CR-496-L, United
3 States of America vs. USPLabs and others. And this hearing is
4 pursuant to the referral of District Judge Lindsay to me of
5 Defendant Herbert's *Brady* motion, Document #130, and
6 Government's cross-motion, Document 143, and Defendant's motion
7 for protective order, Document 210, and Defendant's motion to
8 quash the grand jury subpoena to USPLabs, Document 176.

9 Having reviewed the filings, my plan is to take the motions
10 up in this order. One, first, Defendant Herbert's *Brady*
11 motion, which seems to be raising discrete issues. Secondly,
12 the cross-motion filed and included in the response to that and
13 the Government's cross-motion and the motion for protective
14 order at the same time because they, to me, appear to be
15 related. And the motion to quash the grand jury subpoena to
16 USPLabs last, to double back to that.

17 And with the exception of the Defendant Herbert's *Brady*
18 motion, which I am calling it for short, but with the exception
19 of that, it's my intention that any of the Defense Counsel who
20 want to argue regarding the other motions may do so. I only
21 ask that you not repeat something that co-defendant's counsel
22 has already stated.

23 And so, with that, if we could start, Mr. Weiland, with the
24 Defendant's motion for disclosure of specific impeachment and
25 exculpatory information motion.

1 MR. WEILAND: Thank you, Your Honor. And I certainly
2 applaud the notion that the cross-motion that was filed in
3 response to my motion, my *Brady* motion, is indeed very related
4 to the motion for protective order filed by the company and
5 others. So I understand you're going to consider those two
6 separately so I'm not going to talk about the cross-motion, if
7 that's all right.

8 THE COURT: All right.

9 MR. WEILAND: Your Honor, I can be brief. I know
10 you've read the papers. My client, he pronounces his name
11 Hebert.

12 THE COURT: He--?

13 MR. WEILAND: Hebert.

14 THE COURT: Hebert?

15 MR. WEILAND: Hebert. Matthew Hebert.

16 THE COURT: Okay.

17 MR. WEILAND: And we filed this motion separately for
18 several reasons. But just so the Court is aware, Mr. Hebert
19 was only a 10 percent owner or is only a 10 percent owner of
20 USPLabs. Essentially, Mr. Hebert was the graphics guy who
21 handled the labeling of the various USP products. And so,
22 because of his status in the company and his relative
23 inactivity in terms of operations of the company, particularly
24 the technical aspects of the products, we believe that there
25 could be an enormous amount of exculpatory material in the

1 hands of the Government. And we believe, because of the
2 complexity of this case, that they should point out what they
3 already know to be exculpatory and not wait until the eve of
4 trial.

5 The Government's position, Your Honor, seems to be that we
6 don't know of any exculpatory material, and if we do, we don't
7 have to give it to you until the trial. That's in
8 contravention of Judge Lindsay's opinion in the case, where he
9 says as soon as it's -- the Government is aware of it, it
10 should be produced. Now, --

11 THE COURT: Well, certainly in time enough for you to
12 make use of it, I would think.

13 MR. WEILAND: For sure.

14 THE COURT: Uh-huh.

15 MR. WEILAND: And since we've already had four trial
16 settings, the indictment was in November 2015, now is the time.
17 The Government -- we have kind of a definitional problem here,
18 I think, Judge, because the Government just says in its papers
19 that we are not aware of any document that is genuinely
20 exculpatory in this case.

21 THE COURT: That language is troubling, genuinely
22 being operative --

23 MR. WEILAND: Yes. Of course, the test is that --

24 THE COURT: -- for that.

25 MR. WEILAND: -- they have to produce anything that

1 tends to negate any required element of proof of any of the
2 counts in the case. And so perhaps they misunderstand *Brady*.
3 And we believe that they've already encountered numerous
4 instances of things that would exculpate Hebert, given his role
5 in the company over time, and we think the Court ought to order
6 them to identify this and produce it.

7 THE COURT: Well, how can they identify it and produce
8 it if their response is, aside from the troubling one directly
9 to you, but in their response they state that there is none?

10 MR. WEILAND: Well, --

11 THE COURT: How can they identify something to you
12 that they say doesn't exist?

13 MR. WEILAND: Well, that's -- based on their
14 definition of what constitutes *Brady*, that could be the
15 problem. And it also could be -- the other issue could be
16 that, number one, that statement was made now months ago,
17 months ago, and which we're continuing to get some discovery
18 dribbled in from the Government.

19 You know, maybe the situation has changed, but if it
20 hasn't, it looks to me like their intention is just to produce
21 it on the eve of trial and say, okay, we did find a few things
22 and here they are.

23 Of course, their other position is we don't have to look
24 for it and we've given you, I don't know, a terabyte of
25 information, two terabytes, 500 megabytes, and so just go find

1 it. Of course, they've frozen so much of my client's assets
2 that trying to wade through this is most difficult, most
3 difficult for Hebert himself, put aside the rest of the
4 Defendants.

5 So, Judge, there's things out there like -- let me give you
6 an example of what we haven't seen. This doesn't just affect
7 Hebert at all, but there's patient files. They claim our
8 products have harmed people, so we need to see the patient
9 files of these people who claim harm and find out, because in
10 the related civil cases, investigation has shown that the
11 patients that are the plaintiffs, for example, in some of those
12 civil cases, they have all kinds of preexisting health
13 problems, not to mention they can't prove that they actually
14 took our product.

15 The corollary issue in this case is going to be, did these
16 people actually take our products or did they take a
17 counterfeit product? So --

18 THE COURT: So are you suggesting that the Government
19 already has these medical records in its possession and is
20 refusing to turn over to you information about preexisting
21 conditions?

22 MR. WEILAND: I believe they have access to patient
23 records that they haven't turned over.

24 THE COURT: Well, I don't know what you mean by access
25 to.

1 MR. WEILAND: Well, they have -- perhaps their
2 witnesses have them that they plan to use in the trial. Their
3 experts have them. I believe they have the patient records, or
4 at least some patient records that we haven't seen yet, within
5 their control.

6 THE COURT: Okay. But is this just basically
7 speculation that they have it? I mean, do you have some basis
8 for believing that they have it?

9 MR. WEILAND: Well, based on, for example, now we're
10 deeply involved in the clash of experts, as you've seen from
11 the docket sheet. I mean, there's *Daubert* experts. There's
12 objections to the experts. And it looks to us -- it looks to
13 me, and I'll defer to my colleagues on that because they're
14 better versed, but it looks to me like that they've turned over
15 a few files and there's still files out there that perhaps
16 they're saying, we haven't really reviewed those yet, we're not
17 ready to give them to you. So we'd like an order requiring
18 them to give us what they have.

19 THE COURT: Well, --

20 MR. WEILAND: So, --

21 THE COURT: Okay. So it sounds more like you're not
22 contesting that they have not -- that they have knowledge of
23 any *Brady/Giglio* materials, only their intention to turn them
24 over at a later date.

25 MR. WEILAND: That's true. Yes, Judge.

1 THE COURT: Okay.

2 MR. WEILAND: Of course, I'm aware and you're aware of
3 the background of *Brady* violations and *Giglio* violations that
4 have occurred in other cases, including cases in this
5 courthouse, one of which was very recent. The *Devorn*
6 (phonetic) case is another case in front of Judge O'Connor
7 where this U.S. Attorney's Office had a problem with
8 exculpatory material. And so we --

9 THE COURT: Are you talking about the case with the
10 plea agreement, the plea agreement supplement?

11 MR. WEILAND: Yes.

12 THE COURT: Okay.

13 MR. WEILAND: And so we're skeptical. I've been doing
14 this a long time. I'm a jaded lawyer about, you know, their
15 protestations of, you know, we have two gigabytes -- I mean,
16 two terabytes of information but we haven't seen a single thing
17 that could possibly exculpate poor Mr. Hebert.

18 THE COURT: Well, they definitely have the obligation
19 or they end up in front of Fifth Circuit, just like in Judge
20 O'Connor's case.

21 MR. WEILAND: Right. Uh-huh.

22 THE COURT: I mean, they -- and the obligation is
23 ongoing, whether or not you file a motion. So, I mean, it
24 doesn't prompt -- what I mean is your motion hasn't prompted
25 any obligation or required anything different than what they

1 already were obligated to do under the law. And that's why I
2 keep coming back to the timing of it --

3 MR. WEILAND: Right. Well, --

4 THE COURT: -- versus the requirement that they give
5 it to you, because there's no question that if there is *Brady*/
6 *Giglio* materials that they have, they are required to give
7 those to you.

8 MR. WEILAND: They are. And we would say that they
9 have to define it. They have to define *Brady* material, for
10 example.

11 THE COURT: Who has to define it? Because *Brady*
12 defines *Brady*, *Brady* and its progeny. Why would they have to
13 --

14 MR. WEILAND: Well, what I was trying to say, they
15 have to define it in the way the cases define it, not in the
16 way they seem to be defining it.

17 THE COURT: Well, they have to follow what the cases
18 have defined.

19 MR. WEILAND: Yeah. Yeah. They have to follow the
20 definition, the accepted definition.

21 So what we -- what I think, Judge, would be fair and
22 equitable in the case is for them to produce to us in some time
23 frame that you would consider fair and equitable, but well in
24 advance of trial, whatever *Brady* materials that they have, that
25 they know that they have, and also grand jury testimony,

1 because they have produced some grand jury testimony relating
2 to employees of the company because they were employees of the
3 company.

4 THE COURT: Well, but they don't have an obligation to
5 generally -- I mean, you know that.

6 MR. WEILAND: I know --

7 THE COURT: The rules are specific about when they
8 have to turn over just statements, including grand jury
9 testimony.

10 MR. WEILAND: Well, I'm not sure they understand,
11 though, Your Honor, what would constitute *Brady*. If you read
12 the grand jury's testimony of our employees, these people are
13 saying, well, Hebert didn't have much of a role in the company.
14 You know, Hebert wasn't involved in this or that.

15 THE COURT: Well, how are you reading it if they
16 haven't turned it over to you yet?

17 MR. WEILAND: They have turned over the testimony of
18 employees of the company.

19 THE COURT: Uh-huh.

20 MR. WEILAND: But I believe that there would be
21 similar statements in other grand jury testimony and in witness
22 interviews that would tend to exculpate him, and I'd like to
23 get them before the trial so that we can see for ourselves.

24 Thank you, Judge.

25 THE COURT: I understand.

1 MR. WEILAND: Thank you. My colleague has mentioned
2 one other thing, Judge, is a specific item that we're very
3 interested -- we're very interested in. As part of their
4 effort to establish that our products or some of our products
5 were dangerous, we know that they've gone out and commissioned
6 additional tests of the products, because it's hotly disputed
7 that they're -- that they ever -- that these products ever
8 harmed anybody. And we believe that -- we know that we're
9 entitled to any of those tests where they were unable to
10 establish that the products were harmful. And we know they've
11 been doing the testing, and we would like those --

12 THE COURT: Do you know that they have had some tests
13 that established that, though, or is that speculation? Because
14 if they had some tests that established that, then that -- I
15 would tend to agree with you and they would have the obligation
16 already to turn it over.

17 MR. WEILAND: Right. We don't know what tests they've
18 conducted.

19 THE COURT: Okay.

20 MR. WEILAND: But if there are such where their lab
21 people failed to establish the harmfulness of these products,
22 then we need those and we need them now.

23 MR. RUNKLE: Thank you, Your Honor. I'm Patrick
24 Runkle for the Government. I really appreciate the opportunity
25 to have this hearing today.

1 One preliminary matter that I wanted to discuss was the
2 prospect of grand jury and other sealed material being
3 discussed during the hearing today, and I was just wondering
4 how Your Honor wanted to handle that issue. There are some
5 spectators in the audience and we've already kind of crossed
6 that bridge a little bit.

7 THE COURT: Well, I don't think we've talked about the
8 specific content of any -- that hasn't been revealed already.
9 I mean, obviously, the only thing Mr. Weiland discussed was
10 what he already has.

11 MR. RUNKLE: That's right. It's been revealed to the
12 Defense --

13 THE COURT: Right.

14 MR. RUNKLE: -- pursuant to that rule. But there are
15 going to be more discussions later on. I just wanted to flag
16 that issue before I got into my discussion. I don't --

17 THE COURT: Okay. Well, whenever you think it's an
18 issue, we'll take it up at that time.

19 MR. RUNKLE: Okay. Thank you, Your Honor.

20 So I want to lift the veil of some of the discussions that
21 Mr. Weiland just had, and I wanted to apologize if the Court
22 was troubled by the "genuinely exculpatory" statement in our
23 filing. What I think we meant by that was we do have a
24 disagreement with Mr. Weiland about what is exculpatory in this
25 case. And so we have agreed to fulfill our *Brady* obligations.

1 Obviously, we have to. We have already been doing so, and we
2 have already turned over about -- I think it's seven terabytes,
3 maybe three terabytes. I don't know, terabytes are huge, and
4 there's been millions of documents turned over to the Defense.

5 We've invested extraordinary numbers of resources and man-
6 hours into processing, reviewing documents to turn over. And
7 what I can tell you today is that not a single document has
8 been withheld that we believe is *Brady/Giglio* material. Not a
9 single document has been withheld. So the idea that --

10 THE COURT: But conversely, though, if you're turning
11 over seven terabytes of information, are you saying that you're
12 turning those over as a part of your obligation to provide
13 *Brady/Giglio* materials, in which case, how are they ever going
14 to figure out from that or how is he ever going to figure out
15 from that amount of discovery?

16 MR. RUNKLE: Right. Well, I'd point the Court's
17 attention to the *Skilling* (phonetic) case, --

18 THE COURT: Uh-huh.

19 MR. RUNKLE: -- which sort of had a similar fact
20 pattern. What's happened here is that the search warrant
21 materials were turned over in exactly the form in which we got
22 them. So those images were turned over to the Defense in the
23 same form we got them. The Government documents -- and I don't
24 think there's any controversy that the law says that that's
25 what's supposed to happen, and that's what the *Skilling* case

1 essentially says -- those are their documents already, so I
2 have a hard time believing that there is any obligation for us
3 to go through their documents and point out the exculpatory
4 material to them.

5 As to the grand jury subpoena material, that was also
6 turned over to them in the form in which we got it. And most
7 of that material is of a limited volume compared to the other
8 material.

9 Also, I'm not aware that any of that material falls into
10 any of the categories that Mr. Weiland is talking about, but we
11 can talk about specific issues if there have been.

12 As to the Government's material, --

13 THE COURT: So, so stop.

14 MR. RUNKLE: Yes.

15 THE COURT: So are you saying that the productions
16 were general discovery productions and not specific as to
17 *Brady/Giglio*?

18 MR. RUNKLE: That's correct. Well, we reviewed -- so,
19 for example, here's how we did the Government documents. So
20 those documents were turned over in the form in which we got
21 them, *in toto*, in their entirety. So they have all of those
22 documents. All the third-party documents that have been
23 received by the Government in this case have been turned over.

24 THE COURT: I guess -- and I understand that.

25 MR. RUNKLE: Uh-huh.

1 THE COURT: But what I don't understand is how that
2 relates to your *Brady/Giglio* obligations unless you've
3 identified in those terabytes of documents something that would
4 tend to be exculpatory.

5 MR. RUNKLE: Well, that goes straight into the
6 *Skilling* case, because we believe that they are in the exact
7 same position as we are to be able to review the documents and
8 identify the material.

9 THE COURT: Only if you've not specifically come
10 across something, I would think. If you specifically come
11 across something and you're basically counting on it being
12 hidden in what you've provided -- and I'm not talking so much
13 about their documents --

14 MR. RUNKLE: Uh-huh.

15 THE COURT: -- that have been provided back to them,
16 but the documents from the grand jury, then it seems to me a
17 problem.

18 MR. RUNKLE: Uh-huh. Well, the grand jury material I
19 can say is -- it was provided to them in the same format, and I
20 don't believe that the Government -- a lot of that material is
21 not even reviewed by the Government. So it was -- we did
22 searches on it, we found some documents, and those documents
23 were either incorporated into the indictment or they've been --
24 or a lot of that material hasn't even been reviewed.

25 So it would be very difficult, as I think we've pointed out

1 in our brief, for us to say that we've done an *in toto* review
2 of all these documents.

3 THE COURT: But you've not answered my question yet,
4 --

5 MR. RUNKLE: Uh-huh.

6 THE COURT: -- which is whether you have, in the
7 documents you have reviewed, found something that would fit the
8 definition of information that should be turned over under
9 *Brady* or *Giglio*, and realizing that, simply included those
10 documents in the discovery that you pushed out. So I'm talking
11 about more knowledge on your part than --

12 MR. RUNKLE: Uh-huh.

13 THE COURT: I mean, either you don't -- you didn't --
14 you reviewed it and you didn't find anything, or you reviewed
15 it and you found something and you didn't specifically identify
16 it, you just turned it over with a bunch of other documents.

17 MR. RUNKLE: Well, I think that's -- I don't want to
18 push back on the Court's question. We didn't hide any
19 documents. I think that's the concern of a lot of the cases.
20 So there's no -- there's no attempt to segregate *Brady/Giglio*
21 and then hide it within the documents that were there. And we
22 can have a discussion about what is exculpatory. This is --
23 Mr. Weiland's conception of what's exculpatory is anything that
24 reveals his client was not on a specific email chain. And so
25 using that definition, there's plenty of *Brady/Giglio* in there,

1 and that would be every email chain on which his client wasn't
2 a part. And so that is -- was provided to them as part of
3 their own emails.

4 But let me tell you about what we did with the Government
5 documents, which I think are sort of the core of Mr. Weiland's
6 concern. So, the Government documents were reviewed multiple
7 times for -- specifically for this issue. So there was a first
8 attempt to send all the non-privileged documents out. So there
9 was a screening for any attorney names, any Government attorney
10 names, and all those documents went out that we collected from
11 FDA. Then what happened was we went back and we took the
12 attorney collection and we reviewed every single one of those
13 documents to say, is there anything in here that could be
14 potentially *Brady* or *Giglio*, and those materials were then
15 turned over.

16 And I'm not recalling right now whether that was a separate
17 production, but there was a very limited amount of material
18 that, out of an abundance of caution, we did turn over, because
19 we thought, well, this is something that could potentially be
20 exculpatory or it could be *Giglio* down the line, depending on
21 what witnesses are called.

22 So that's the length that we've gone to to try to answer
23 this issue, is we've actually turned over what would be
24 privileged material in order to fulfill our *Brady* and *Giglio*
25 operations.

1 Another example of what we've done is Mr. Weiland was
2 talking about certain tests that were conducted. So the
3 Defense raised to us in a number of detailed letters, they
4 actually point out something that we were unfamiliar with prior
5 to them pointing it out, which was that a very limited study
6 was done by a scientist at the National Center for Natural
7 Products Research in Mississippi on their product back at the
8 time of the outbreak. And so what we did when we found that
9 out, we were interested in it because we frankly didn't know
10 about it, and so I sent a paralegal who spent three days in
11 Mississippi collecting documents on those topics, any document
12 in existence, and that was turned over in a production along
13 with the expert discovery, because one of the scientists who
14 did that research worked on our expert discovery also.

15 So that's the length that we've gone to to fulfill our
16 obligations in this case. And it's -- you know, Mr. Weiland's
17 sort of conjecture about there must be documents out there,
18 well, there are documents that he would consider exculpatory
19 and that out of an abundance of caution we may consider
20 exculpatory, too. But I'm not going to send him a list of
21 documents when his conception of *Brady*, he's described it to
22 you, it's anything that reveals his client wasn't as involved
23 in the criminal conduct as the other defendants. Well, that's
24 -- that may or may not be *Brady*, but he has all of that
25 material and we've, you know, we've taken a lot of effort to

1 get those materials.

2 The other example that Mr. Weiland gave to you was patient
3 files. So what I can tell you is that not a single -- to my
4 knowledge, not a single patient file in the possession of the
5 Government has been withheld on any basis, and there's not
6 going to be an eve-of-trial dump of *Brady/Giglio* if I can help
7 it. I mean, there's no *Brady/Giglio* sitting back there waiting
8 to be --

9 THE COURT: What do you mean, if you can help it?

10 MR. RUNKLE: Well, there -- this is a very large case
11 and they have had numerous run-ins with FDA for many years.
12 And so when we go back and ask what FDA scientists touched this
13 case, that list has expanded over time. And as another example
14 of the lengths that we're going to, we are about to send to the
15 FDA a list of something like 25 additional custodians, out of
16 an abundance of caution, to have their emails and documents
17 searched to determine whether they have any materials that
18 could be considered exculpatory in this case. Because FDA is a
19 very large agency, with something like 10,000 employees, and so
20 it's just impossible for us to know exactly everything that's
21 going on in the agency, and so we've had to do a lot of work to
22 try to get these documents and to try to fulfill our
23 obligations.

24 And it is an ongoing process. It's a large criminal case,
25 and that's where we are right now. We have six months until

1 trial right now, as long as the trial doesn't get delayed
2 again, and we are working very hard to get the materials out.
3 We just did another production the other day because FDA had a
4 technical problem with its email server where some of the
5 attachments were getting archived in a different -- in an
6 incorrect place. And so we spent months going back to FDA and
7 trying to manually pull attachments out of emails to try to get
8 those attachments and link them with their parent emails and
9 then send them to the Defense. And so that's the kind of work
10 that we've been doing to try to fulfill these obligations.

11 And so when I said if I can help it, I mean we are trying
12 to complete discovery as quickly as we can. That's what I
13 mean. But there are obviously -- in the government, there are
14 agency concerns, there are agency resource considerations, and
15 we are working as fast as we can. But the vast majority of the
16 discovery and the major custodians in the case were turned over
17 a long time ago, a year and a half ago, along with all the
18 search warrant material and all of these materials. So that's
19 where we are.

20 Thank you, Your Honor.

21 MR. WEILAND: Your Honor, just a couple of things. I
22 want to mention that -- excuse me. I want to mention, as an
23 aside, something Mr. Runkle just alluded to, that the trial was
24 six months away if the trial happens. You know, my client has
25 been adamant about wanting to get to trial, and the Department

1 of Justice represented to a federal judge in Virginia recently
2 that there was -- that they didn't think the trial would go in
3 January of 2018, this trial. And so I'd appreciate the Court's
4 inquiring for the benefit of my client about whether the
5 Government anticipates yet another continuance. Because he's
6 saying they're still making discovery, they're doing the best
7 they can. We got the indictment in November of '15 and
8 obviously we weren't ready, but we're trying to get ready. So
9 I'd appreciate that, Judge.

10 The other thing he said that I thought was most interesting
11 was, we don't -- we do not hide anything. And then he said, we
12 did the screening for attorney names and then we reviewed the
13 attorney collection and sent some things over that could
14 possibly be exculpatory. Well, they didn't tell me they were
15 sending anything over that could possibly be exculpatory, so
16 there it lies in the three terabytes or he said seven terabytes
17 possibly of information. And that's not -- that is not the way
18 *Brady* disclosures are supposed to work.

19 MR. ROPER: Your Honor, can I interpose?

20 THE COURT: Do you represent Mr. Hebert?

21 MR. ROPER: I just -- my concern is that they want
22 wiggle room to not have a specific deadline to produce *Brady*
23 material. And I'm concerned by the wiggle room they're having
24 that it can include this -- another absolute massive dump,
25 document dump. And if you read the *Skilling* case, they even

1 are concerned about the issue of when you have a document dump
2 and you have to go through a massive amount of evidence to --
3 so I think it's appropriate to have some kind of deadline.
4 Many of the district judges here have deadlines to produce
5 *Brady* material. If you look at the case --

6 THE COURT: But Judge Lindsay didn't have such a
7 deadline in his scheduling order.

8 MR. ROPER: He didn't. Now, if you look at the case,
9 that *Pinon* case he cites, --

10 THE COURT: Uh-huh.

11 MR. ROPER: -- it does say and really what the
12 Government is saying is as long as you give it to them before
13 trial, it's good enough for essentially government work to do
14 it, to produce it by the deadline.

15 THE COURT: Well, in time enough for them to make good
16 use of it.

17 MR. ROPER: Now, if you read the opinion, though,
18 Judge Lindsay relies on the fact that the Government says,
19 look, as soon as we get it, we're turning it over. I don't
20 think that's enough in this case. And the reason is, after the
21 indictment in the case -- and this turns on the dangerousness
22 of these dietary supplements -- after the indictment, they
23 commissioned a study to try to shore up what I think is their
24 insignificant evidence to show that these dietary supplements
25 are dangerous. They commissioned it after the indictment and

1 they turned that over. And because of that, we've scurried
2 around to try to respond to it. But all that involves what
3 their experts consider dangerousness. Some of them rely on
4 patient files. And what I'm afraid of, because of the kind of
5 unique circumstances in this case, I'm afraid, whether the
6 Government says they're using their best efforts or not, that
7 we're going to get to the eve of trial and have a bunch more
8 evidence, even maybe more test results, that we're going to be
9 scurrying around trying to get ready for trial, and then Runkle
10 will -- Mr. Runkle or the Government will then say, well, you
11 know, look, here's Judge Lindsay's opinion. As long as you
12 give it to them before trial, you're in good shape.

13 So I think there's -- it's -- this is kind of an unusual
14 circumstances that I think require a deadline for the
15 Government to produce any *Brady* material. I don't think it's
16 inappropriate. We're six months from trial on a massive case.
17 We may have a week of *Daubert* hearings in this case. I think
18 it's appropriate to put the Government to a deadline where
19 they're obligated to produce before trial.

20 And you know, it's -- look, it's not our fault that it's a
21 massive case. The Government decided to bring it. And if
22 they're big enough to bring the case, then they are big enough
23 to live up to a deadline to produce *Brady* material. And if
24 it's a document dump, then identify what they have.

25 MR. RUNKLE: Thank you, Your Honor. There's not going

1 to be a document dump in this case.

2 What has happened is essentially a waterfall in that there
3 are -- they have kept requesting documents when they have been
4 going through the Government documents, and they've said,
5 what's this, what's that? And some of those things, we didn't
6 know about, and so we've gone back and gotten limited amounts
7 of material to fulfill their requests. But they've -- what I
8 am not representing today is that that material is *Brady*
9 material. They've requested a lot of additional documents
10 from scientists at FDA who may or may not have sent an email at
11 some point in 2012 about the Defendants. And so that may or
12 may not be *Brady* material, but I'm trying to fulfill my
13 obligations to get that heretofore unknown email, read it, and
14 turn it over to the Defense as I get it. There's not going to
15 be a document dump.

16 THE COURT: Mr. Runkle, let me ask you this about
17 something that you discussed previously.

18 MR. RUNKLE: Uh-huh.

19 THE COURT: When you went through the Government's
20 documents, --

21 MR. RUNKLE: Uh-huh.

22 THE COURT: -- what you identified as the Government's
23 documents, and determined that these subset of documents may be
24 *Brady/Giglio*-type materials and you turned those over, did you
25 turn those over separately or with something? And also, what

1 was the volume of that?

2 MR. RUNKLE: That volume was very limited. I think it
3 was less than 50 documents, maybe less than 20. And I don't
4 believe it was buried in any other production. I have to
5 check. I frankly don't remember. I know that we conducted
6 that review. I believe the results of that review was that a
7 few documents were identified and that those documents were
8 promptly turned over. That's what I recall about that.

9 And I wanted to respond to Mr. Weiland's discussion about
10 the scheduling of the case. What happened was that one of the
11 Defendants was convicted of fraud in the Eastern District of
12 Virginia and is now in federal prison. And he tried to get out
13 of prison because he wanted to come to the hearing today. He
14 tried to stay his self-surrender date so he could come to the
15 hearing today. He got a sentence of eight months and he's
16 incarcerated outside Bakersfield in California. And so one of
17 the arguments in that case was that he needed to be out to be
18 able to assist in the defense of this case.

19 That was handled by a completely different AUSA, who I've
20 had very limited contact with. You know, several phone calls.
21 I believe the judge in that case found that the complexity of
22 this case and the filings on the docket and the number of
23 pending motions indicated to him, as I think it would indicate
24 to any reasonable observer, that maybe this case might be
25 delayed again. It is not the Government's intention to delay

1 this case. We would be happy to take this case to trial in
2 January.

3 And as to Mr. Roper's contention that there should be a
4 deadline, if Judge Lindsay wants to set a reasonable deadline
5 or Your Honor wants to set a reasonable deadline, I think that
6 that would be appropriate, but, you know, that deadline is not
7 tomorrow. And the Defense is the ones who request -- they are
8 the ones who requested early *Daubert* motions.

9 THE COURT: When is that deadline, then, in your
10 estimation?

11 MR. RUNKLE: Well, we defer -- this is a case being
12 run out of Washington. We defer to local practice. Judge --
13 we understand that Judge Lindsay prefers to defer to his
14 standard practices. If we want to have a discussion with Judge
15 Lindsay or Your Honor about if that deadline or his standard
16 practices need to be varied in this case, I would be happy to
17 have that discussion. But I don't think it needs to be in the
18 context of this motion, because this motion is not about
19 scheduling. It's about, you know, pretrial disclosure of *Brady*
20 material, which we have committed to do. So I appreciate the
21 opportunity to discuss it.

22 MR. WEILAND: Can I just say one last thing, Judge?
23 I'm not going to argue with him. I'm just going to point out
24 that I have a proposed order that I can file in the normal
25 course or I could hand it up that calls for them to do the

1 production within 30 days and as soon as practicable but no
2 less than 90 days prior to trial to produce these -- some of
3 these other things we've talked about.

4 THE COURT: Okay. I appreciate that. You know, the
5 problem with the ongoing *Brady/Giglio* responsibility or
6 obligation of the Government is that it is ongoing and there is
7 no certain date that it ends so that the Court can say, by this
8 date, all the *Brady/Giglio* materials that the Government is
9 aware of must be turned over. However, to the extent that the
10 Government already has identified *Brady* and *Giglio* materials,
11 I'm troubled with the notion that that doesn't have to be
12 turned over pretty much immediately.

13 In this case, Mr. Runkle, you've indicated here that you,
14 as to -- and I agree with you as to the items that were seized
15 from Defendants. Defendants should be able to look through
16 their own documents and determine if anything tends to
17 exculpate. You know, but as to the -- what you call the
18 Government's documents, the fact that there were these
19 approximately 50 -- and I'm not holding you to that number --
20 but these 50 documents that were turned over and it wasn't
21 identified when it was turned over as a *Brady/Giglio*
22 production, in light of all the terabytes of information
23 involved in this case and that have been turned over, sounds a
24 lot like a data dump.

25 For that reason, I'm only going to grant the motion to this

1 extent. To the extent that you've already identified
2 *Brady/Giglio* materials, and even if you've produced those, I am
3 going to require you within 14 days to advise defense counsel
4 which of those documents you identified as potentially
5 *Brady/Giglio* and produced already.

6 As you prepare for trial and prepare for this case and
7 become aware of other documents or other types of evidence that
8 would tend to exculpate, fit the definition of *Brady* and/or
9 *Giglio*, I'm going to require that within 14 days of your
10 discovery of such, that you turn those materials over to the
11 defense and you let them know that it is a production pursuant
12 to your *Brady/Giglio* obligations until this case is tried.

13 I'm not going to require you to stop preparing for your
14 case and look through every document you have and decide
15 whether or not it fits the definition of *Brady* and *Giglio* at
16 this time, but as part of preparing your case, you will
17 naturally do that, and you have done that. And so I believe
18 you have an obligation beyond simply just turning that over.
19 You have an obligation to timely turn it over within a timely
20 manner of you discovering it. And as, again, that obligation
21 is ongoing, I would expect that any production would be
22 ongoing.

23 And so to the -- so to the extent Mr. Weiland on behalf of
24 Mr. Hebert seeks additional relief, that relief is denied. So,
25 --

1 MR. WEILAND: Thank you, Judge.

2 THE COURT: Then let's move on to -- and let's not
3 start with the Government's cross-motion, because, frankly,
4 when I read it, as far as argument goes, it seemed to me
5 premature. If the Defendant or no Defendant had specifically
6 made a claim or sought a protective order regarding any
7 privilege or work product, attorney-client privilege or work
8 product information, there is no relief to be granted in a
9 cross-motion. You know, but it does relate to the
10 subsequently-filed motion for protective order, and so I'm
11 ready to take that up, you know, as to USPLabs and Defendants
12 Geissler -- is that how you pronounce it?

13 MR. NIEWOEHNER: Geissler, yeah.

14 THE COURT: Geissler, Doyle, and Hebert.

15 MR. NIEWOEHNER: Thank you, Your Honor. I'm Chris
16 Niewoehner. I'm here on behalf of the USPLabs. We appreciate
17 the opportunity to sort of synthesize -- what you just said
18 makes a lot of sense in terms of how to handle this. The
19 protective order motion subsumes a lot of the cross-motion
20 issues. With your permission, I'm going to ask my colleague,
21 Mr. Linehan, at one point to address a portion of that.

22 So, Your Honor, in our motion for protective order, the
23 Defense has laid out a culmination of a series of missteps and
24 errors by the prosecution in this case that relate specifically
25 to the handling of privileged materials. There's five

1 different phases of this case: the search warrant application
2 itself, the execution of the search warrant, the use of the
3 search warrant materials, the taint procedure that's been
4 identified, and even the filings in this case. And in each of
5 them, the Government has demonstrated -- has an indifference or
6 a refusal to fully protect obviously attorney-client privileged
7 documents.

8 THE COURT: Let me stop you there, because it looks
9 like to me that in the Government's response that they are
10 repeatedly stating that they haven't identified this attorney-
11 client privileged or work product information or material. And
12 if you haven't specifically identified it to them, how could
13 they ever know that it needs some special protection?

14 MR. NIEWOEHNER: Well, I think, broadly speaking, we
15 have, in the sense of at the very beginning --

16 THE COURT: But under every rule regarding attorney-
17 client information, it's not broad. It's something specific.
18 There is some specific thing.

19 MR. NIEWOEHNER: Okay. And we have given them -- when
20 I meant broad, I meant in the sense of communications between
21 an outside law firm, an outside civil firm handling matters
22 that are directly the subject of the search warrants in this
23 case.

24 THE COURT: Well, that's not quite the definition of
25 privilege, but go ahead.

1 MR. NIEWOEHNER: There -- that topic, --

2 THE COURT: Yes.

3 MR. NIEWOEHNER: -- those lawyers have handled things.
4 There have been communications, there's been work product that
5 was unquestionably seized by the Government. They acknowledge
6 that. There's no confusion that there is what would normally
7 be attorney-client privileged materials. In fact, their taint
8 team to date has identified 41,000 documents that they say are
9 privileged. So I don't think there's any --

10 THE COURT: So if the taint team identified them, are
11 -- is it your position that despite the fact that the taint
12 team identified them, the Government has made some use of them?

13 MR. NIEWOEHNER: Our concern and why we're trying to
14 take this really one very limited step at a time, we are not
15 trying to get ahead of ourselves here, we are asking for
16 discovery to more fully answer the question you just posed.
17 Because what I can tell you today from the evidence we've been
18 given is not just the history I just described but I want to
19 show you specifically in their taint team protocol the evidence
20 that shows that they don't know whether their taint team has
21 identified documents they otherwise would acknowledge would be
22 attorney-client privilege. Their taint team process is broken
23 in one way, and we don't understand how because -- and that's
24 why we're asking for discovery, effectively. We want
25 information.

1 THE COURT: Let me ask you this. But are these
2 documents documents that they actually took so that you don't
3 have access to them, or that they imaged so you do have access
4 to them?

5 MR. NIEWOEHNER: We do have access to them because
6 these are things taken out of the search warrants. So they
7 took --

8 THE COURT: So have you reviewed the materials that
9 were taken to determine which ones you are concerned about?

10 MR. NIEWOEHNER: We did a snap -- we gave examples.
11 We have not tried to go through the hundreds of thousands --
12 there's three million documents at issue. We have not tried to
13 do a privilege log of every single document. But what we have
14 done is we said, well, tell us which documents you've screened
15 out as privileged and we can focus on the section you haven't
16 screened out.

17 And what we did is we provided examples in our motions,
18 specific examples, and said, look, based on what you're telling
19 us, this should have been in the taint folder. This should
20 have been identified as privileged. And they've come back now
21 with an answer, and I want to focus on the answer, and the
22 answer demonstrates that they cannot assure the Court that
23 privileged materials isn't being handed over to the
24 prosecution.

25 Now, I don't know today what Mr. Runkle has looked at, so I

1 can't tell you today which document that was privileged that he
2 has seen because I don't have access to that information.
3 We're trying to take this one step at a time and we're trying
4 to identify what are the problems in their process that would
5 allow Mr. Runkle to see otherwise clearly privileged materials.

6 And our -- again, small steps. We're not asking for the
7 world here. This is a very significant issue in this case.
8 Attorney-client privilege is sacrosanct in any case, but as --
9 there's been in the papers that you've seen, as we've raised,
10 there were civil attorneys providing advice on the very topics
11 that they're being charged with. I'm not asserting any kind of
12 defense right now. I'm just noting what's in the papers.

13 It is therefore very important to us to determine that the
14 attorney-client privilege is respected. And the history of
15 this case says it has not been respected. And we believe that
16 history gives Your Honor the basis to go further, to require
17 the Government to answer questions that, quite frankly, are no-
18 brainer questions in many contexts. How did your taint team
19 work? What was screened? What search terms did you use? When
20 did you do this? Who was involved? What process did you
21 follow?

22 THE COURT: Then are you talking about providing more
23 detail than was provided in the affidavits that were attached
24 to the -- what I have determined is related Government's cross-
25 motion?

1 MR. NIEWOEHNER: Yes. And I want to show you
2 specifically the more detailed affidavit they did and point to
3 the questions that it raises for me that are not answered, the
4 problems that emerge from their representation. It doesn't
5 solve things. It makes it worse.

6 THE COURT: Well, are you going to get into the
7 specific instances that would support your argument for good
8 cause to issue a protective order?

9 MR. NIEWOEHNER: Yeah. I mean, I -- we're doing --

10 THE COURT: Or is someone else doing that?

11 MR. NIEWOEHNER: I was going to do that, Your Honor.

12 THE COURT: Okay.

13 MR. NIEWOEHNER: So I'm happy to sort of walk through
14 for you the history that we strongly encourage you says --
15 gives you the factual basis to do the protective order and to
16 order the additional information be delivered that we're
17 seeking.

18 So, as a threshold matter, the Government has suggested you
19 don't have the power to do anything here. They say that Rule
20 16(d)(1) doesn't give you the power to police effectively the
21 treatment of privilege here. And we've demonstrated to you
22 that's not the case. Rule 16(d)(1) is a very flexible statute.
23 It provides for any -- you can grant any appropriate relief.

24 And their suggestion to you is they say, well, of course,
25 if there was a clearly wrong privilege review process, you --

1 that's improper. They acknowledge that in the papers. But
2 they say the remedy for that is that, at trial, if they sought
3 to admit a privileged document, we could move to exclude it.
4 That's woefully inadequate, because imagine this scenario.

5 THE COURT: Well, that may -- that's why there are
6 taint teams, so --

7 MR. NIEWOEHNER: Well, that would be part of what we
8 could do, sure. But what the --

9 THE COURT: Uh-huh. But you don't want it to get to
10 that point?

11 MR. NIEWOEHNER: Exactly. And because there's many
12 ways short of actually admitting something at trial. In their
13 situation, a prosecutor could knowingly and willfully decide to
14 look at all the privileged documents, get the strategy that
15 they would never otherwise know, be smart enough not to -- or
16 not -- or not be stupid enough to actually put one of the
17 privileged documents into evidence, just use all the
18 information. Under their proposal, there would be absolutely
19 nothing that could be done about that.

20 That is not the law. It is clear that that can't be the
21 case. This Court under Rule 16(d)(1) -- and quite frankly,
22 under your inherent power to supervise cases, and particularly
23 in the context of attorney-client privilege -- has the power to
24 order what you deem appropriate to protect the privilege.

25 So, once you move beyond that threshold step, let's just

1 take a look at the history, the pattern and practice here.
2 This is a complicated case. It's a large corporation. This is
3 not your sort of normal small-time fraud, drug, whatever, fill
4 in the blank. And that's been known from the beginning. And
5 this is -- when we -- when I said there's five phases, I'll
6 walk you through.

7 The first one is the search warrant application itself.
8 There is no question that the Government knew when they sought
9 the first search warrant in this case, which they brought
10 before Your Honor, they knew that USPLabs was represented on
11 matters that overlapped with what they were seeking the search
12 warrant for. We gave you the history, the back and forth
13 between the government agencies. DOJ knew that. They also
14 knew they were going to be submitting a search warrant seeking
15 essentially the entire computer system at the corporate offices
16 of USPLabs, meaning they're going to get the email.

17 It is not rocket science to realize, if you're going to get
18 all the email from the company, you're going to get
19 communications with lawyers. That is a salient fact here.
20 That is a fact which Your Honor would have had no idea. They
21 gave you no notice whatsoever. And for you to do your job as a
22 judge, to ensure that an *ex parte* search warrant is appropriate
23 and is tailored to what it needs to get, that's information you
24 should have had. And they knew.

25 But that's not the end of the story. They go and they

1 execute the search warrant that day. They're told repeatedly,
2 as evidenced by their own declaration by Ruth Brewer, a lawyer
3 at the scene, that she was a civil attorney who represented
4 USPLabs and she pointed out different parts of the offices that
5 were used by attorneys, and they say they tried to respect
6 that. Maybe they did, maybe they didn't. But they are given
7 -- and they also had a conversation, the lead Texas prosecutor
8 had a conversation with an attorney for the firm who also
9 pointed out, again, privilege is at issue here.

10 Later that day, they go back in and they get a second
11 warrant, this time for Mr. Geissler's house, where they knew
12 Ruth Brewer, the civil attorney, also lived. They knew they
13 were going to run into the issue of legal communications, and
14 again they told the judge nothing. There's no notice, there's
15 no taint procedure, nothing. There's no way for the judge --

16 THE COURT: Well, that's an interesting situation
17 since they live together, I mean, so --

18 MR. NIEWOEHNER: It's not the norm perhaps, but this
19 is something that --

20 THE COURT: Or that they'd be conducting their legal
21 business as a part of their personal business.

22 MR. NIEWOEHNER: But they knew it, and there's no way
23 the judge would know it, and they did nothing to protect
24 whatever privilege would be there.

25 And it gets worse. A week after the search, there's an

1 explicit conversation between Mike Uhl on behalf of the company
2 and the AUSA in Texas, and it's raised that you took attorney-
3 client privileged materials. Two weeks later, they go in for a
4 third search warrant, seeking the email communications. There
5 is nothing in the search warrant to alert the supervising judge
6 that there is a privilege issue here. There is no protection.
7 At each one of those steps, they easily could have told the
8 judge at least this is going on, these are the procedures we
9 were going to address.

10 THE COURT: So is it your suggestion that if the
11 judge, including myself, would have known that there is the
12 possibility of seizing attorney-client information, the
13 warrants wouldn't have been issued?

14 MR. NIEWOEHNER: I think Your Honor would have had the
15 opportunity to at least say, what are you doing about the
16 privilege? How are you going to comply with your duty to make
17 sure that nothing -- follow DOJ policy that nothing is going to
18 be done that doesn't have to be done, protections will be put
19 in place? That opportunity was completely gone.

20 It doesn't mean that ultimately the search warrants --
21 maybe they would have been granted exactly as they are. I
22 don't know. That's not where we are today. But I feel that
23 Your Honor would have wanted to know that information, and we
24 would want Your Honor to know that information, because then
25 you would be -- again, *ex parte* situation, you'd be in a

1 position to say, hey, what are you going to do about the fact
2 that there's going to be attorney-client privilege materials
3 there? They deprived the Court and thus the Defendants of that
4 line of defense. And they had multiple opportunities to do it,
5 and each time they failed.

6 THE COURT: Well, let's fast forward, because this
7 relief that you're seeking isn't dependent on that.

8 MR. NIEWOEHNER: No. This is just part of the story.

9 THE COURT: Okay.

10 MR. NIEWOEHNER: So let's go to the second phase, the
11 actual execution of the search warrants. Again, I told you
12 about attorneys on the scene trying to tell the Government that
13 this is going on. And what they took was every single email in
14 the entire system. They did nothing on the scene to protect
15 it. They did not have a taint team in place, and their
16 procedures were nothing.

17 On top of that, as they've now admitted in their agent's
18 declaration, the case agent, at the house, during the search of
19 the house, took a cell phone belonging to a civil attorney who
20 represented the company, and he went through the text messages.
21 Now, I don't know from the -- from the information they've
22 provided, they claim it was for physical safety.

23 THE COURT: Has she identified to you what these
24 materials are that are apparently attorney-client privilege? I
25 mean, I just can't imagine there were troves of documents in

1 the house that were actually privileged in their residence, in
2 their personal residence.

3 MR. NIEWOEHNER: Well, she had a home office where she
4 did work.

5 THE COURT: Okay. I heard --

6 MR. NIEWOEHNER: So her --

7 THE COURT: I saw there was supposed to be a sticky or
8 something on the door that said law office.

9 MR. NIEWOEHNER: That's right. She tried to -- I
10 mean, part of what she tried to do is highlight this is a legal
11 office.

12 THE COURT: Okay.

13 MR. NIEWOEHNER: She put a sticky on the door. She
14 told them. But computers are taken, documents are taken, there
15 is no taint team in place.

16 THE COURT: Well, the Government says that when she
17 told them, I believe -- am I thinking of the wrong one? -- that
18 these are privileged, they didn't take those.

19 MR. NIEWOEHNER: They say at the warehouse that they
20 -- that there are certain rooms she designated as being
21 attorney areas essentially and that they tried not to take
22 those documents or they didn't take those specific computers.
23 What, of course, that ignores is, you know, you don't take the
24 lawyer's computer, but guess what? The email between the
25 lawyer and the guy sitting next to him is on the other guy's

1 computer. It's there.

2 So it's an inadequate protection to simply not take that
3 lawyer's computer and still --

4 THE COURT: But she could tell -- she should be able
5 to tell what they are, though.

6 MR. NIEWOEHNER: We can go back and try to recreate
7 some of these things about what --

8 THE COURT: Well, they should be there. You're saying
9 that there are duplicates on other people's computers.

10 MR. NIEWOEHNER: Right.

11 THE COURT: Then she should be able to say and could
12 have informed you that these are the specific things that I'm
13 concerned about.

14 MR. NIEWOEHNER: And we have -- again, I have not
15 tried to do a privilege log of every communication, in part
16 because we're trying to figure out from them what they've seen
17 and what they've not seen. We have recognized that a taint
18 team process can protect the Defense from the prosecution team
19 from seeing the damage, or seeing the privileged documents. So
20 just because they took a privileged document is not necessarily
21 the end of the story. It's what has been made available to the
22 prosecution team, and that's where we need help.

23 THE COURT: Okay. Well, let's get to that.

24 MR. NIEWOEHNER: Okay.

25 THE COURT: Okay.

1 MR. NIEWOEHNER: So, again, in terms of -- may I do
2 one more stage before I get to the taint process itself?

3 THE COURT: Okay.

4 MR. NIEWOEHNER: My third point is the use that the
5 prosecution team has made of the seized material. And we've
6 raised the situation of what happened in Hawaii. I'm not going
7 to belabor it other than to note that the prosecution team was
8 in close communication with the Plaintiff's firm out in Hawaii.
9 It's a firm called Andrews & Thornton. Before -- we were
10 looking at this before September 29, 2015. There was something
11 like over 20 emails and letters about witness interviews in
12 this four-year approach that they produced today. We, of
13 course, don't know what the oral communications were, but this
14 is a close relationship.

15 And what they did is they took the entirety essentially of
16 the data -- of the server they took and they dropped it in the
17 lap of the Hawaii judge. And the Hawaii judge chastised them
18 and said, I didn't know you were going to do this, and he sent
19 it back. And a second judge who was apprised of the situation,
20 as we noted, called it arbitrary and capricious and possibly
21 criminal, which I don't think people lightly say of the
22 prosecution.

23 And if you look at what the Plaintiff's attorneys tried to
24 do, they then made an argument which said USP, you don't even
25 get to see your own documents. We get to look at this. So the

1 effect of what happened was that the Plaintiff's firm had a
2 shot at getting the entirety of our computer server without us
3 even getting a chance to look at it and protect our privilege.
4 That was --

5 THE COURT: Since then, have you gotten it?

6 MR. NIEWOEHNER: It has been returned.

7 THE COURT: Okay. And have you had an opportunity to
8 see whether or not it contained privileged information or work
9 product information?

10 MR. NIEWOEHNER: I should be more careful. I believe
11 the physical object that the prosecution sent to Hawaii was
12 returned to the prosecution. My understanding is that that
13 server is the same server that they copied and gave to us. So
14 I don't have -- we don't have the specific object, but I do
15 believe we have a copy of what it was.

16 THE COURT: Right. So if you're concerned that they
17 violated privilege by sending that, then certainly you could do
18 a search and determine which of that was. It's hard for any
19 judge to make a determination as to whether there is privileged
20 information that needs to be protected if you don't identify
21 it.

22 MR. NIEWOEHNER: Right. And understood. I'm using
23 this more as an example of the pattern of practice of
24 indifference to our privilege, as opposed to asking Your Honor
25 to do a specific remedy for that specific situation.

1 THE COURT: Okay. Because, you know, you've got to
2 show good cause.

3 MR. NIEWOEHNER: I think that's what we're doing --

4 THE COURT: Okay.

5 MR. NIEWOEHNER: -- by showing these recurring steps
6 where mistakes, error, bad judgment, each of those things I
7 think can contribute to Your Honor's ultimate finding of good
8 cause that additional discovery is warranted. And again,
9 that's all we're asking for.

10 So what I'd like to do next is to produce -- show you
11 specifically -- and with Your Honor's permission, I'll give you
12 what is the Government's declaration. And I just want to
13 highlight two particular paragraphs or three particular
14 paragraphs for you. Can I do that?

15 So this is what was attached as Exhibit 4 to Document 234,
16 or Docket #234-5, which is Exhibit 4 to the Government's
17 motion. And this is the declaration from the Government that
18 lays out the more detailed explanation of what their taint
19 process was. And if you -- a few things about it. If you look
20 at Paragraph 4, it starts saying that since April 2014, the
21 taint team has received approximately three million documents.
22 Well, that raises an immediate question to me, which is, the
23 search was conducted in November of 2013. What happened
24 between November of 2013 and April of 2014? Did literally
25 nobody look at anything the entire time for six months?

1 THE COURT: Which isn't a bad thing because you're
2 concerned about it being revealed, but go ahead. It sounds
3 like maybe they --

4 MR. NIEWOEHNER: Perhaps literally nothing happened
5 with that. I don't know. But that's, again, --

6 THE COURT: Okay.

7 MR. NIEWOEHNER: That raises a question to me as what
8 was going on before April of 2014.

9 Going on further, what the declaration explains, as I
10 understand it, is there's roughly three million documents that
11 are produced, that are given to them. They do a couple
12 screens. They do what they call a SK Labs relevance screen,
13 which I don't think is pertinent for our purposes. That was
14 required in a search warrant out in California. It was looking
15 at SK Labs' materials, not USP, so let's put that to the side.

16 And what they did is they identified search terms. They've
17 given us a handful. They say there are hundreds. I don't know
18 what the list is to assess whether those are the adequate terms
19 or not, but they do these -- they run the search and they
20 identify a world of documents. They say about 90,000. And
21 then this taint team looks at the 90,000 and they assess
22 whether it's privileged or not. And for about 41,000 of them,
23 they assessed it was privileged, and presumably for the other
24 49,000 or so, they're not.

25 And what they said is, we then gave access to the remaining

1 three million to the prosecution.

2 THE COURT: Uh-huh.

3 MR. NIEWOEHNER: So at that point there is no limit.

4 If Mr. Runkle were to do a search and a privileged document

5 were to have gone through, he's got it. He can see it. We

6 don't know what Mr. Runkle looks at, I'm not asking for him to

7 tell you that today, but that's the fact. Anything that the

8 taint team didn't --

9 THE COURT: So what you want, in essence, is to know
10 what documents they considered privileged, potentially

11 privileged, so that you then will review the remainder of the

12 documents -- because you had those documents, or copies or

13 access to -- and determine whether or not others should have

14 been or --

15 MR. NIEWOEHNER: Well, that's -- and that's what --

16 THE COURT: -- should have been designated as

17 potentially privileged?

18 MR. NIEWOEHNER: What we want to know is their

19 process. And here's why. We took five examples.

20 THE COURT: What specifically do you want to know

21 about their process that they've not explained to you? Maybe

22 that will help me.

23 MR. NIEWOEHNER: Okay. The gist of what they say here

24 is, okay, we looked at your five examples --

25 THE COURT: Uh-huh.

1 MR. NIEWOEHNER: -- and we agree: none of them were
2 identified as -- by the taint team. All five are clearly
3 privileged. They are sent to outside law firms relating to
4 legal matters of the company.

5 So the question is, well, why weren't those five emails
6 identified by the taint team? And what they do is they go
7 through -- and what's troubling is they admit that for each of
8 these five examples, that specific email wasn't reviewed by the
9 taint team. And that's a question for me, is if they ran the
10 search terms they claim they ran, these emails should have
11 popped up, but they didn't.

12 And it raises the further question: well, if these emails
13 didn't pop up when they claim they ran the search terms they
14 claim they ran, what other email that should have been caught
15 by these screens didn't pop up and therefore went to that?

16 THE COURT: Let me ask you this. Have you had your
17 own IT experts run a search that you believe would reveal which
18 documents were in fact privileged or could be considered work
19 product?

20 MR. NIEWOEHNER: We ran -- we tried to decipher --
21 what we were given by them is, here's the 41,000 documents that
22 we tagged as privileged.

23 THE COURT: Okay. So they didn't give you everything
24 that was seized, --

25 MR. NIEWOEHNER: No, --

1 THE COURT: -- all your documents that were seized?

2 MR. NIEWOEHNER: No. They did.

3 THE COURT: Okay. So on that --

4 MR. NIEWOEHNER: They've given us --

5 THE COURT: So on that -- on that --

6 MR. NIEWOEHNER: Right.

7 THE COURT: On that universe of documents, did you
8 have your own IT experts -- because you're complaining about
9 their terms and how it didn't reveal this. What did you do to
10 determine from your own, on your own, which of these that they
11 should have identified as?

12 MR. NIEWOEHNER: We did a -- we have done some
13 searching.

14 THE COURT: Okay.

15 MR. NIEWOEHNER: That's how we identified the five we
16 found.

17 THE COURT: Okay. Did you identify any more from
18 this?

19 MR. NIEWOEHNER: We found other -- yes, we did.

20 THE COURT: Okay.

21 MR. NIEWOEHNER: I did --

22 THE COURT: Have you listed those on a privilege log?

23 MR. NIEWOEHNER: We have not.

24 THE COURT: Okay.

25 MR. NIEWOEHNER: Because it's -- we didn't understand,

1 until we got this declaration, we didn't have a clue as to how
2 they were doing anything.

3 THE COURT: Okay. So --

4 MR. NIEWOEHNER: And we had made our general objection
5 --

6 THE COURT: -- has this declaration, which I'm trying
7 to get to, I'm asking you what more specific information you
8 want, has this pretty much mooted your request for an
9 explanation of how the taint team process works?

10 MR. NIEWOEHNER: No. And let me highlight the
11 paragraph that's --

12 THE COURT: Please give me some specifics --

13 MR. NIEWOEHNER: Okay.

14 THE COURT: -- of what else you want to know.

15 MR. NIEWOEHNER: Can I direct Your Honor to the very
16 last paragraph, 14?

17 THE COURT: Uh-huh. Uh-huh.

18 MR. NIEWOEHNER: And the declarant says, "I wasn't
19 involved in the collection or processing of the documents that
20 the taint team received and was tasked with reviewing, and
21 therefore I have no explanation for why the taint team did not
22 receive the specific versions of these documents."

23 I want to know --

24 THE COURT: "But I can only confirm that neither the
25 taint team nor the prosecution has ever had or reviewed them."

1 MR. NIEWOEHNER: For those five. What about all the
2 other ones that --

3 THE COURT: What all the other ones? Because you're
4 not giving -- you're not even letting anybody see what they
5 are. You're not identifying what they are so somebody can make
6 a determination of how they might have slipped through, if
7 anybody has reviewed them, who shouldn't review them, namely
8 the prosecution team, and -- or even in fact that they are in
9 fact privileged or work product.

10 MR. NIEWOEHNER: I understand Your Honor's point. We
11 can run an electronic search and come up with a slew of things
12 that apparently don't compare. I get your point on that.

13 THE COURT: Uh-huh.

14 MR. NIEWOEHNER: But it wouldn't obviate the question,
15 which is, what did they see already? Because what isn't there
16 -- we could identify --

17 THE COURT: Okay. So you want to know what of the
18 90,000-something documents they identified? See, that's not
19 what you're saying. You're not saying of the 90,000-something
20 they identified with their computer search you want to know
21 which 41,000 -- and I'm probably getting the figures wrong --
22 they decided were potentially privileged or work product.
23 You're wanting to know about the three million documents. How
24 can -- I don't -- how can that --

25 MR. NIEWOEHNER: So, two things we can do. One, I'm

1 happy to go and do a search and try to identify search terms
2 and compare it to the 41,000 they have said are privileged and
3 identify examples.

4 But what that's not going to ever explain -- that I suppose
5 will make it more specific -- but it won't explain what process
6 they used, why their own expert confesses, I have no idea what
7 happened here. She can't explain why the taint team wasn't
8 given certain things.

9 THE COURT: Well, that doesn't sound like a protective
10 order to me, that relief. But tell me what more you want
11 specifically them to tell you about their process. And I can't
12 get that from you for some reason.

13 MR. NIEWOEHNER: Okay. So let me try --

14 THE COURT: It's becoming kind of frustrating.

15 MR. NIEWOEHNER: Let me try.

16 THE COURT: Okay.

17 MR. NIEWOEHNER: What we would like would be them to
18 answer our questions. We could be happy to give Your Honor a
19 list of the questions as we sit here.

20 THE COURT: Well, if you want that to happen, you
21 should.

22 MR. NIEWOEHNER: Okay.

23 THE COURT: What are the questions?

24 MR. NIEWOEHNER: And I'm -- I am not in a position to
25 tell you every question right now that we would want to ask,

1 but I can give you the categories we've identified in our
2 motion. We want to know who was on the taint team, when they
3 were on the taint team.

4 THE COURT: And what is that going to tell you?

5 MR. NIEWOEHNER: It will tell us, in part, to make
6 sure they're on the prosecution team, it's -- and to know who
7 the witnesses will be.

8 THE COURT: Well, but they've told you the taint team
9 people weren't on the prosecution team, so how is --

10 MR. NIEWOEHNER: For a certain period of time, but not
11 the entirety. I noted that six-month gap. This woman who did
12 the declaration wasn't there at the beginning. So I don't know
13 what happened before November -- before April of '14, this
14 person doesn't have any knowledge.

15 THE COURT: So you want to know where the documents
16 were, the seized documents were, prior to being turned over to
17 the taint team?

18 MR. NIEWOEHNER: And what procedure -- what was done
19 before April 2014. Maybe nothing. Maybe there was no taint
20 team.

21 THE COURT: Where they were and if they were accessed.

22 MR. NIEWOEHNER: Who had access to them.

23 THE COURT: Who had access to them. Okay.

24 MR. NIEWOEHNER: For that initial time frame.

25 THE COURT: Okay.

1 MR. NIEWOEHNER: Once the taint team is instituted,
2 I'd like to know all the search terms they used. We have an
3 example of some of them but we don't know all. I'd like to
4 know what criteria they used to determine whether something was
5 privileged or not. They have floated the idea, for example,
6 that nothing is privileged because --

7 THE COURT: So even if they give them to you, those
8 search terms, and they give you their definition, and based on
9 that you say, oh, that wasn't good enough, --

10 MR. NIEWOEHNER: Then I -- what that will do is the
11 next step. We will provide the list of specific examples. We
12 will try to go through and forensically determine --

13 THE COURT: Why can't you do that without knowing what
14 their search terms were and the rest of this, since you have
15 the documents? Why can't you provide -- full circle --

16 MR. NIEWOEHNER: We will --

17 THE COURT: -- a list of those documents that you
18 contend were privileged that they might have had access to?

19 MR. NIEWOEHNER: We can do that independently, but I
20 would say it would --

21 THE COURT: You should do that independently, because
22 that's how it works.

23 MR. NIEWOEHNER: We -- all right. We will.

24 THE COURT: Uh-huh.

25 MR. NIEWOEHNER: But that's not going to end the

1 inquiry for us. Because if we identify a world -- say it's one
2 document, say it's 10,000 documents -- that don't appear to
3 have been screened out by their taint team, that doesn't end
4 the -- that just means, okay, now we've got to figure out what
5 happened over there. Who --

6 THE COURT: What do you mean, what happened over
7 there?

8 MR. NIEWOEHNER: Who saw it.

9 THE COURT: You identify documents their taint team
10 specifically didn't screen as attorney-client privilege so they
11 turned them over to the prosecution. And so now you have a
12 list of documents that you contend shouldn't have been provided
13 to the prosecution because they were privileged or work product
14 protected, and then you move for a remedy to that.

15 MR. NIEWOEHNER: And I guess, Your Honor, what we're
16 asking is, contemporaneously with that, is that you give us the
17 discovery that we're seeking in terms of how their process
18 worked. Because only one of those two --

19 THE COURT: Because how is that going to advance the
20 ball?

21 MR. NIEWOEHNER: Because it will then let us know
22 whether in fact there was some -- was it human error? Was it
23 willful? Was it a mistake? Who saw what? The consequence is
24 what matters here.

25 THE COURT: Okay.

1 MR. NIEWOEHNER: The consequence matters, depends on
2 their procedures, if they in theory had a --

3 THE COURT: Well, you know, Lucy will have some
4 'splaining to do if you come up with a list of documents they
5 should have identified and they didn't. Once you've come up
6 with a list of documents, they'll have to explain why they
7 didn't screen them out in their taint process. That would be
8 part of getting the remedy, right?

9 MR. NIEWOEHNER: It would be.

10 THE COURT: Okay.

11 MR. NIEWOEHNER: Agreed. And I guess I'm trying to --
12 we have a trial date six months away. I think, given the
13 pattern that we've shown, that understanding how they treated
14 what they had, which would inform us, would also help us look,
15 quite frankly, if I knew what search terms they used or didn't
16 know -- didn't use.

17 THE COURT: You don't -- you can't come up with some
18 search terms that you think are relevant to find your own
19 privileged and work product information? You know the people
20 involved. You know the issues involved. You can't come up
21 with that to have your own experts find out from you which of
22 those documents should have been identified as privileged or
23 work product?

24 MR. NIEWOEHNER: We can and we will.

25 THE COURT: Okay.

1 MR. NIEWOEHNER: But the point would be --

2 THE COURT: And that would be interesting, to know if
3 your process comports with their process, which would tell you
4 whether or not there is some willfulness going on, if your
5 process was obvious and it reveals these things that theirs
6 didn't, to me.

7 MR. NIEWOEHNER: Agreed. But I don't know that we
8 have to operate in the dark here. What --

9 THE COURT: That's not operating in the dark. That's
10 --

11 MR. NIEWOEHNER: On what they did.

12 THE COURT: -- being proactive because it's your
13 responsibility to make sure that your work product and -- or to
14 bring to the Court's attention if your work product and
15 privilege material has been compromised.

16 I mean, nothing about knowing their process seems to me,
17 based on what you're arguing here, alleviates you of the
18 responsibility of determining which of those documents, if any,
19 were -- in addition to the five that you say -- were provided
20 to the prosecution team by the taint team and they reviewed
21 those things, and seeking some remedial action as a result.
22 Nothing that you have requested changes what will have to
23 happen on your part.

24 MR. NIEWOEHNER: I hear you on that, but I'll suggest
25 that it will facilitate this process. That we could

1 independently do everything you just said.

2 THE COURT: And if you can explain to me how it
3 facilitates that process, that's the part I'm not getting. And
4 I'm probably not being clear about that, but that's the part
5 I'm not getting, is how does that -- because it sounds like
6 that's two separate things.

7 MR. NIEWOEHNER: Okay.

8 THE COURT: How does that facilitate your process?

9 MR. NIEWOEHNER: In part, just as a technical matter.
10 I'll use one example. Search terms. They used a bunch of
11 them. We independently can come up with our own, agreed.

12 THE COURT: Because you already claim theirs are
13 inadequate.

14 MR. NIEWOEHNER: Well, actually, I don't know. I
15 don't --

16 THE COURT: So you're not going to use theirs.

17 MR. NIEWOEHNER: I don't know what they are. Maybe
18 they're entirely adequate.

19 THE COURT: Well, but independent of that, you'll
20 determine what they should have done.

21 MR. NIEWOEHNER: Well, --

22 THE COURT: This is what you should have done.

23 MR. NIEWOEHNER: And my point, my only -- my limited
24 point is, agree with you on that, that given the stage of the
25 proceedings, given the burden on them, to simply provide us the

1 search terms they used will help us (a) craft our own. We can
2 do it independently, loud and clear, but we'll know if there's
3 an issue right off the bat. And if they -- if their list term
4 doesn't include chrisniewoehner@steptoe.com, just using me as
5 an example, and that's an obvious error, we would know to
6 focus, on our searching, to look for
7 chrisniewoehner@steptoe.com. It would assist us to identify
8 the holes in their production by getting the list of their
9 search terms. And at this point in the game, I don't know why
10 we couldn't get that.

11 THE COURT: Well, you have everything, though, that
12 was taken. And if your point of getting their search terms is
13 to point out later to the Court how woefully inadequate their
14 taint team process was, you know, it's like hindsight is 20/20.
15 Oh, I would have done it better. Well, if you do it to begin
16 with, you can show that this was the obvious way it should have
17 been done and it wasn't, as opposed to looking at theirs and
18 grading their work and saying, oh, but you didn't, oh, but you
19 didn't. You've got the stuff. You've got the stuff.

20 You've got more information about -- you've got more
21 information than they ever had about who was involved, what was
22 involved, the time frames involved. So it would seem to me
23 that you could have already looked at that and determined which
24 of those documents were turned over to the prosecution that
25 shouldn't have been.

1 MR. NIEWOEHNER: All right. We took a sampling
2 approach to demonstrate the issue to try to identify whether --
3 you know, quite frankly, whether both sides need to spend a
4 huge amount of time on this.

5 THE COURT: Uh-huh.

6 MR. NIEWOEHNER: And that's part of the -- look, part
7 of the reason I'm trying to get information, much as I would
8 love to do a privilege review of three million documents,
9 that's a huge imposition on us.

10 THE COURT: Uh-huh.

11 MR. NIEWOEHNER: And if we can do things to shortcut
12 it --

13 THE COURT: So if you have -- if you know what
14 documents the taint team identified, if you know the whole --
15 what 90,000-something -- and I'm probably mixing up the numbers
16 at this point -- documents that were sent to the -- identified
17 through the search term process, of which the taint team
18 specifically reviewed and determined 40,000-something was,
19 47,000 -- or 47,000 wasn't, so if you had that information,
20 this is what ultimately they received from the taint team that
21 potentially or they thought might have some privilege based on
22 the search terms but was later determined not to, would that
23 answer your question?

24 MR. NIEWOEHNER: It's the end result.

25 THE COURT: That's what I'm talking about, the end

1 result.

2 MR. NIEWOEHNER: Result.

3 THE COURT: The end result.

4 MR. NIEWOEHNER: Yes. To figure out what the next
5 step is, ultimately, we'll have to have some subset of the
6 world. We think it will be more graceful, less burdensome on
7 us, given their errors on the front end, that we should be
8 given some --

9 THE COURT: That's -- that's -- go for it.

10 MR. NIEWOEHNER: All right. So I guess what I'm
11 trying to understand, where you're headed. Just your
12 preference would be that we identify some world of documents we
13 believe are privileged?

14 THE COURT: I think that's what the law requires of
15 you, to at least say, these are privileged, these are work
16 product, and you've seen them, and so now I need the Court to
17 fashion a remedy for me.

18 MR. NIEWOEHNER: Okay. My difficulty will be, you
19 know, because I don't know what Mr. Runkle actually has seen,
20 but we have the world that they didn't screen out, so we will
21 do our best to identify the world that they should have
22 screened.

23 THE COURT: Exactly.

24 MR. NIEWOEHNER: And we can -- and then I expect we'll
25 be right back here and then I'll ask for the same --

1 THE COURT: And that's what we get paid for. Exactly.

2 MR. NIEWOEHNER: Then --

3 THE COURT: I'm sorry. I don't mean to cut anybody
4 else's argument off that wants to add to that, but, you know, I
5 think -- I don't think you're at the point that you get the
6 relief that you're requesting until you come back with some
7 evidence that, or identification, some evidence identifying
8 what.

9 And it would be different if they had kept from you your
10 own records that they seized or kept from you the universe of
11 documents that were turned over to the prosecution by the taint
12 team, but it doesn't sound like that's happened here. It's
13 like you have that information from which you can determine
14 whether or not they've done something untoward.

15 MR. NIEWOEHNER: Understood, Your Honor.

16 You've obviously seen our briefs on the other things. What
17 I would do now is to turn to Mr. Linehan. There were some
18 waiver arguments that were raised that --

19 THE COURT: Yes. And they raised them first, so --
20 and I'm, you know, I'm not getting the waiver stuff, so maybe
21 I'll give them an opportunity to explain that a little better
22 to me, because I don't get that. And then we'll see if it's
23 necessary to respond to it.

24 MR. NIEWOEHNER: All right. Thank you, Your Honor.

25 THE COURT: Okay.

1 MR. RUNKLE: Thank you, Your Honor.

2 THE COURT: Yes, sir.

3 MR. RUNKLE: So I will keep -- I have a presentation
4 that will -- I'll keep it to be as brief as possible. I don't
5 have five stages. I think I have fewer than that.

6 THE COURT: And is this something that the people on
7 the other side have?

8 MR. RUNKLE: No. I'm giving it to them right now.

9 THE COURT: Okay.

10 MR. RUNKLE: It's just an outline of what I'm going to
11 discuss.

12 THE COURT: Okay.

13 MR. RUNKLE: Okay. So the first thing I'd like to do
14 is lift the veil a little bit, again, on some of these obscure
15 arguments that are being made about we don't know, we don't
16 know this, we don't know that. I can explain why the taint
17 attorney wrote in her affidavit that she didn't know why no one
18 had seen those documents, because we did an investigation to
19 figure out what was happening when they filed those five
20 documents, which were neither in our collection nor apparently
21 in the taint collection. So we did an investigation to figure
22 that out.

23 Their reply was actually very helpful because it pointed
24 out the specific file path where those files came from. And it
25 turned out, when we looked -- and this is the Exhibit 1 which

1 we provided to the Court and the Defense yesterday -- this is
2 what I saw. So Mr. Niewoehner wanted to know what I saw, so
3 I'm going to show him what I saw. When I went into those file
4 paths, this is what I saw. And if I could direct Your Honor's
5 attention to the file name, which is ceo.usplabsdirect.com.pst,
6 PST is an Outlook file format that stores a bunch of emails.
7 And if you -- I'd direct Your Honor's attention down to slip
8 sheet reason, not extracted. So these files, it turned out,
9 the contractor who performed the processing which was going on
10 during the six months that Mr. Niewoehner thinks were missing,
11 the documents were being processed. There's millions of them.
12 It turned out, and we didn't know this until they filed their
13 motion, that some of the PST files had not been extracted and
14 had taken errors, and the contractor had never let us know that
15 those files had taken errors.

16 So I think that can, even though I understand where Your
17 Honor is going with their motion, I did want to resolve that
18 issue for the Court and for the Defense, because we haven't
19 seen those documents. The reason that they're not there is
20 because they were not processed, so --

21 THE COURT: So your explanation for the affiant saying
22 that the reason that she -- there is no explanation for why,
23 she had no explanation for why the taint team didn't receive
24 specific versions, is because you hadn't done the investigation
25 yet and determined why?

1 MR. RUNKLE: That's correct. So she had -- it was not
2 immediately apparent to us why we hadn't seen those specific
3 documents because we didn't know -- the Defense had not
4 provided us where they had come from. Your Honor, the way that
5 documents are collected is through a forensic process, and so
6 the images are extracted and then there are files and then
7 those files are processed. And so without knowing where a
8 specific file that the Defense had came from, it was very
9 difficult for us to identify where they would have seen
10 documents that we didn't have. We were able to identify that
11 after we got their file paths, which they filed in their reply.
12 And so that's why I brought it with me today, to provide that
13 answer to the Court and to the Defense. And it's just a fact
14 of life that sometimes technical errors happen, and they did in
15 this case.

16 So I wanted to -- in my presentation -- I'll move through
17 the first parts very quickly because I think that the Court has
18 already appreciated these points, which is that privilege must
19 be asserted specifically over specific documents. And the
20 Courts of Appeals have been very clear that a blanket assertion
21 of privilege over that collection as privileged is not adequate
22 to actually assert a privilege. And so I believe there's a
23 basic failure of proof in this motion on whether any of the
24 documents are privileged.

25 THE COURT: You know, that's -- and, of course, that's

1 all true. But in the context of this criminal case, there was
2 a purpose for the taint team. And so if what you represented
3 by using the taint team process is that you have not reviewed
4 or seen any attorney-client work product information that was
5 seized -- because, of course, they have no control. Unlike in
6 a civil situation where you ask them for the documents and they
7 get to review them and they get to say, no, I'm not going to
8 produce those to you because they are -- and then we come to
9 Court and we fight about it, you went in and you took them, so
10 they had no recourse at that point for you taking them, no
11 opportunity to review what you were taking. And so they have
12 to depend on your taint team process to do in a criminal
13 context something they might have been able to do in a civil
14 context to protect their information.

15 So, with that in mind, to make the blanket statement that
16 they have to identify them has to take into consideration the
17 process, that these documents were seized pursuant to warrant
18 as opposed to requested pursuant to subpoena or some other
19 discovery method by which they would have had an opportunity,
20 before the documents were in the hands of the Government, to
21 make a determination.

22 You know, my point, though, was that since then and since
23 you've done the taint team process and since counsel for
24 Defendants do have access and knowledge of what those documents
25 are, that they can very well at this point do what they

1 couldn't at the beginning, and that's identify which one of
2 those that were seized and that you've been provided or have
3 been provided to you as the prosecutor from the taint team you
4 shouldn't have gotten, is the point.

5 So, through the backdoor process, they can do that now, but
6 to say that they were expected to do it before, at the
7 beginning, there's just no way they could, which is why it
8 matters if the taint team process was sufficient.

9 But without some -- we just don't get to decide non-issues
10 here, so there has to be an issue, is the point. And without
11 some evidence that you've actually -- the taint -- that you've
12 actually gotten some documents you shouldn't have, or been
13 privy to some documents you shouldn't have, there is not a
14 question for the Court to determine or a dispute for the Court
15 to determine or good cause to enter an order for protection,
16 without something else at this point. That was my point, if
17 that helps you get to --

18 MR. RUNKLE: Yes, it does, Your Honor.

19 THE COURT: Okay.

20 MR. RUNKLE: I agree with much of what you said, and
21 that's why there was a taint process in this case. It was a
22 very rigorous process. It consumed a lot of resources.

23 And what I wanted to make absolutely clear that may not
24 have been entirely clear from the discussion with Mr.
25 Niewoehner is that, over a year ago, and I remember because it

1 was when my son was born, and he just turned one, we turned
2 over those 41,000 documents that were privileged or potentially
3 privileged, that the taint team had flagged to the Defense. So
4 that has already -- they have -- that has been in their
5 possession for a year.

6 THE COURT: And he acknowledged that.

7 MR. RUNKLE: That's right. I just wanted to make sure
8 there was -- near the end of the discussion it was not clear
9 that that was -- that that had actually taken place. So that
10 was a year ago. And of course, they've had the broader search
11 warrant collection for a year and a half, I believe. And so
12 that was all available to them.

13 Now, and they've pointed out these five documents, which we
14 haven't seen, and there are potentially other documents that
15 there would be errors in, and we would be very happy to
16 cooperate in a meet-and-confer. If they identify documents, we
17 can tell them why either we haven't seen the document or why it
18 hasn't been provided to the prosecution team or why it has been
19 provided to the prosecution team. We would have been willing
20 to engage in that type of meet-and-confer but we never got to
21 that point because what we got was a motion, you know, about
22 all the misconduct that we -- you know, alleging that we
23 committed all this misconduct, which, you know, we don't
24 believe any of it happened.

25 And so I'll try to skip a lot of the hyperbole, but I'll

1 just hit the highlights, which is that none of -- there was a
2 taint process in place during the search warrant executions.
3 And I know Your Honor might not be very concerned about that,
4 given where you're headed, but there was a process in place to
5 put potentially privileged physical material into a box that
6 was delivered to the U.S. Attorney's Office that was reviewed
7 by the taint team eventually and it was not reviewed by the
8 prosecution team.

9 So that was the process. And there just were not -- the
10 privileges were not run roughshod over, to use their phrase
11 that was in their motion. Those factual things did not occur,
12 and I think that we have made a showing on that.

13 I can move on to -- I did want to touch very, very briefly
14 on the allegation that I have colluded with Plaintiff's lawyers
15 in the civil cases in Hawaii. It's very, very far from the
16 truth, that that has occurred. Of course, it wouldn't even be
17 relevant to this motion because no privileged material was ever
18 given to those attorneys. The material was sent and it was
19 approved by the Civil Division's FOIA office to send that hard
20 drive to the District Court in Hawaii for *in camera* review.

21 THE COURT: How can -- I don't understand, with that
22 being seized in an ongoing criminal case, how it could be
23 subject to FOIA anyway.

24 MR. RUNKLE: The issue was that there were -- so, it
25 may or may not have been subject to FOIA, but I'm not a FOIA

1 attorney. We discussed this with the FOIA office and there was
2 a discussion and this was a potential resolution. And they
3 were very happy to get this FOIA request off of their plate.
4 And that was the way that it worked.

5 THE COURT: You discussed it with them and this was a
6 resolution?

7 MR. RUNKLE: Yes.

8 THE COURT: So you came up with the idea they should
9 get it?

10 MR. RUNKLE: I don't believe I came up with the idea.
11 I -- the discussion -- I don't remember where the idea
12 originated. I believe the discussion was along the lines of
13 this is a massive amount of material to review to see if it is
14 privileged, or, I mean, to see if it is FOIA-able, because
15 there are numerous government documents within the search
16 warrant collection because they had been corresponding with the
17 Government.

18 I think there was some concern -- and as I said, I'm not a
19 FOIA attorney -- there was some concern with the idea that
20 potentially the Government's communications with the Defendants
21 would have been FOIA-able from that collection. I believe
22 there was some concern about that. But I -- as I said, I'm not
23 a FOIA attorney.

24 And the idea was that the court in Hawaii, if the parties
25 were willing to pay for a special master, I guess, would have

1 been able to sort out the issue. There was also a very, very
2 serious concern -- that continues to be a concern -- about
3 obstruction of justice and perjury on the part of the
4 Defendants in those cases.

5 THE COURT: So did you actually send the entire
6 universe of documents seized, then, to Hawaii?

7 MR. RUNKLE: The search warrant images were sent to
8 Hawaii.

9 THE COURT: Well, then who -- who then excluded any
10 attorney-client or potentially attorney-client privilege that
11 was produced in that --

12 MR. RUNKLE: The Court would have. That was -- the
13 Court -- we didn't send it to the Plaintiff's attorneys.

14 THE COURT: Right.

15 MR. RUNKLE: We sent it to the Court for *in camera*
16 review. That was the entire point. Because we didn't want to
17 violate their privileges, so we sent it to the Court. They
18 represented to the Court that they didn't have this material in
19 that case.

20 THE COURT: How is that in response to a FOIA request?

21 MR. RUNKLE: Well, there was a FOIA request that once
22 they represented -- I believe the timeline was that once they
23 represented to the Court in Hawaii that there was no -- that
24 they didn't have this material, then the Plaintiff sent a very,
25 very long and very detailed FOIA request to the Civil Division,

1 which is the division where I work, and that generated this
2 whole process.

3 I understand that, in retrospect, maybe it -- I -- in
4 retrospect, what we should have done would have been to send
5 the materials to the Defense, which of course we did a few
6 months later. So there was -- I mean, it's hard to understand
7 how there's any prejudice for this, because the Court sent the
8 documents back to us.

9 THE COURT: Uh-huh.

10 MR. RUNKLE: And so it really isn't germane even to
11 the topic of the motion. But I did want to go into some of the
12 waiver issues. And --

13 THE COURT: And I want you to.

14 MR. RUNKLE: You would like me to?

15 THE COURT: That's what --

16 MR. RUNKLE: Great.

17 THE COURT: It was in my to do.

18 MR. RUNKLE: Okay. Let's go. So let's go to that.
19 That, so there are five different privilege waivers on the
20 table in this case. And I can tell that the Court is not
21 necessarily inclined to go this direction, and so I will keep
22 it --

23 THE COURT: But I'm listening.

24 MR. RUNKLE: I will keep it -- I will keep it --

25 THE COURT: Because maybe there was something in the

1 written materials that I just didn't look at.

2 MR. RUNKLE: Well, I will keep it very brief. The --
3 I think -- I'll give a general statement first. I have five
4 different privilege waivers here. I'll deal with the second
5 one first. There is an advice of counsel defense in the ether
6 in this case. It is very obvious that there is. It has been
7 discussed informally with us. I do not want to put words in my
8 friends across the aisle's mouths, but it has been discussed
9 with us. We believe that it will eventually be asserted and
10 that eventually there will be no privilege over this material.
11 They have said that they haven't decided --

12 THE COURT: So eventually they might waive their
13 privilege, but right now they haven't?

14 MR. RUNKLE: Well, no, that's not -- that's not my
15 point. I'm telling you that generally that is a topic that --
16 that relates more to the protective order motion than it does
17 to the waiver argument, but I believe that there is that
18 defense and it will be asserted formally before Judge Lindsay
19 in some fashion.

20 And so that also makes the protective order motion, in my
21 mind, extraordinarily premature, if you're going to eventually
22 waive privilege over these materials. So, there's that.

23 The --

24 THE COURT: And, you know, they could present that
25 defense without turning over every communication they had with

1 their attorneys.

2 MR. RUNKLE: That's absolutely true. And we've been
3 --

4 THE COURT: Legal advice.

5 MR. RUNKLE: That's absolutely true. And I believe
6 that we've been investigating. There is some case law where
7 we're going to ask Judge Lindsay to set a certain date or a
8 certain procedure for how they will assert the privilege so
9 that it doesn't make the trial have to stop in the middle where
10 we have the fight about what the scope of the privilege waiver
11 is. And I think there's some case law for that. So that, I
12 just wanted to put that out there, that that's -- that's the
13 strong belief of us, and I'm not putting words in their mouths
14 but I believe that that will happen.

15 So, on to the privilege waivers that we've already talked
16 -- that I've briefed already. The Hebert letter to the
17 Government asserting that there was an advice of counsel
18 defense that should be presented to the grand jury, I certainly
19 understand the Defense's argument that it seems like a casual
20 invocation of it instead of a formal one that would actually
21 waive privilege. However, there's a big distinction between
22 the cases that they cite and the conduct that actually occurred
23 here, because the distinction is -- the distinction lies with
24 the grand jury.

25 So, asking the Government to go into the grand jury and

1 tell the grand jury, hey, they say they have an advice of
2 counsel defense, it seems to me that that can constitute a
3 waiver, because the grand jury is entitled to investigate that
4 defense. And that's the difference between what their -- their
5 cases and this factual scenario.

6 THE COURT: This? Is that something we should take
7 up? Because --

8 MR. RUNKLE: Is there anyone not associated with the
9 case in the courtroom?

10 THE COURT: No.

11 MR. RUNKLE: I mean, maybe we should have a discussion
12 about that.

13 THE COURT: No.

14 MR. RUNKLE: We can have a discussion about it.

15 THE COURT: Well, I --

16 MR. RUNKLE: I would like to have that discussion,
17 because the answer -- there is an interesting answer to that
18 question.

19 THE COURT: Uh-huh.

20 MR. RUNKLE: And the answer is that the Defendants --
21 their employees who testified in front of the grand jury
22 repeatedly attempted to invoke the corporation's advice of
23 counsel defense. And we told them on numerous occasions to
24 stop talking about it. And so they repeatedly tried to do
25 that.

1 Now, I don't know who told them to say that. I don't want
2 to cast aspersions. But it seems hard for me to believe that
3 when I start asking questions to the Defendant's employees that
4 the first thing that comes to mind is Peter Hutt from Covington
5 & Burling told them to do that. I just find that very
6 difficult to believe. So I believe that there was a concerted
7 effort to present an advice of counsel defense to the grand
8 jury.

9 THE COURT: It just seems like just at this point
10 that's a premature issue.

11 MR. RUNKLE: Uh-huh.

12 THE COURT: To me.

13 MR. RUNKLE: Well, it --

14 THE COURT: Because -- it just seems that way to me.

15 MR. RUNKLE: It is not a full, you know, it's not a
16 full waiver.

17 THE COURT: Right.

18 MR. RUNKLE: It's not the way you would expect it to
19 come.

20 THE COURT: Right.

21 MR. RUNKLE: But I do want the Court to consider the
22 concept of what is the Government supposed to do when it gets a
23 letter like this.

24 THE COURT: Well, I don't think --

25 MR. RUNKLE: Because either -- or, I'm sorry.

1 THE COURT: I don't think you go, aha, that every
2 communication that I have in my possession between you and your
3 attorney is now subject to, which is the point.

4 MR. RUNKLE: Right. Well, I didn't do that.

5 THE COURT: Right.

6 MR. RUNKLE: Right?

7 THE COURT: So that's the point. So what else do we
8 need as far as the protective order and waiver?

9 MR. RUNKLE: Okay. There is the -- I think there is a
10 waiver by inaction point that I wanted to bring up here, at the
11 very least to -- and I want to make two distinctions here. One
12 is --

13 THE COURT: Well, there is some time that you hope,
14 you know, that in the year and a half, or the year, based on
15 your son's birthday, that you would think that they would have
16 had time to go through and look and actually specify which of
17 the documents they contend are privileged or amount to work
18 product. Still, with all that's going on here, I don't see
19 that you can make the leap to say that they then intend to
20 waive because they've been inactive.

21 MR. RUNKLE: Well, I want to focus Your Honor's
22 attention on the period prior to that.

23 THE COURT: Okay.

24 MR. RUNKLE: So there's two years between the search
25 and the indictment.

1 THE COURT: Uh-huh.

2 MR. RUNKLE: Two years. And their --

3 THE COURT: And did you give them their stuff back at
4 the beginning of the two years?

5 MR. RUNKLE: They got their stuff back on the day that
6 the search warrant was executed.

7 THE COURT: Okay.

8 MR. RUNKLE: The computers --

9 THE COURT: I thought you told me that was a year and
10 a half.

11 MR. RUNKLE: No, that was -- we reproduced it out of
12 an abundance of caution. So we gave them -- their computers
13 were imaged, I think with the exception of one hard drive that
14 would not image properly, but their computers, the vast
15 majority, and I am talking about the vast majority of the
16 material, was imaged and given back to them, you know,
17 contemporaneously with the search. If not the same day, two or
18 three days later. That's my understanding of it.

19 And so the -- that period, to me, evokes some sort of
20 waiver -- and this is why I wanted to make the distinction --
21 not necessarily as to every document in the collection but as
22 to the tainting procedure which they now admit that they knew
23 was going on at the time, there was not a letter, there was not
24 a motion under Rule 40 -- is that 1 or 2 -- 42, I believe.
25 There was not a motion under Rule 42 to return the property

1 during that two-year-long period. There was never a mention of
2 it in anything.

3 And so to come here after you get indicted and try to get
4 discovery into what Mr. Runkle has seen because there was a
5 tainting procedure that you knew was going on, well, you know,
6 that's a trap that everyone would fall into.

7 And I think that some of the other arguments reveal that
8 that's where this is really headed, is that their arguments
9 could be made in any case involving any defendant who's
10 represented by any attorney, that, you know, they took our
11 stuff, and, you know, we waited, and then we got indicted, and
12 now, you know, we get discovery into Government misconduct.
13 And I just don't think that that's --

14 THE COURT: Well, it wouldn't have mattered if you
15 hadn't indicted them.

16 MR. RUNKLE: That is a very good point, Your Honor.

17 So there's one additional waiver point that I wanted to
18 bring up, and this is one that is under seal. This is another
19 grand jury matter that's under seal before Judge Fitzwater.
20 And I just wanted to make this point. This was something that
21 I want to make a point for the record and also for the future
22 when we go back. Apparently, we may go through this process
23 again, from what I hear from Mr. Niewoehner.

24 So, before Judge Fitzwater, Judge Fitzwater ruled that Cy
25 Willson, who's one of the Defendants, is not covered by the

1 Defendants' privilege, and we got over 3,000 documents that
2 they had -- that involved attorneys that had been sent to Cy
3 Willson. Since this happened -- and this is in a footnote in
4 my response, and I think it will become very -- more important
5 in the future, which is why I wanted to put it on the record
6 today -- is that because Mr. Willson -- these were given to Mr.
7 Willson not in the context of a litigation, Rule 502 doesn't
8 apply, and we're in the pre-502 world of subject matter waiver.
9 And so every communication that was sent to Mr. Willson, given
10 Judge Fitzwater's ruling, acts as a subject matter waiver over
11 that subject matter of the attorney advice.

12 And so when -- and I just want to caution the Court, and I
13 understand where you're headed with the current motion, but in
14 terms of the protective order motion, that significantly
15 recasts the kind of relief that they are seeking, because if
16 they assert that a certain document is privileged -- in fact,
17 in their reply, they assert privilege over responding to FDA
18 warning letters regarding the November 2013 liver injury
19 outbreak that their products caused. And when they say that
20 that's privileged and that's one of the things that we
21 violated, in fact, they emailed Cy Willson, you know, dozens of
22 times about their draft responses to those warning letters,
23 including the attorney advice that was made on those things.

24 And so I just wanted to put that on the record, that there
25 will have to be a fulsome discussion of the subject matter

1 waivers that happened with respect to Mr. Willson.

2 So, if there's nothing further, Your Honor.

3 THE COURT: No.

4 MR. RUNKLE: Thank you.

5 MR. LINEHAN: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. LINEHAN: Pat Linehan on behalf of USPLabs.

8 I'm going to try and keep this brief. My sense is that you
9 believe this waiver issue is premature, and I don't want to
10 waste the Court's time. I do want to address a few of the
11 issues that Mr. Runkle raised.

12 You know, for all of Mr. Runkle's speculation as to what
13 the Defendants will be doing vis-à-vis an advice of counsel
14 defense, we are six months away from trial. We have not made
15 any such determination, and we don't have to. So I don't think
16 that should be a relevant part of any analysis as to whether
17 there's been waiver here.

18 I would like to address the Shiphandler letter and some of
19 the things that Mr. Runkle said regarding that letter. I don't
20 think the letter was asking -- I think he's mischaracterized
21 the comment that Mr. -- Mr. Shiphandler's letter. If you look
22 at the letter, he's asking for information. He has no idea
23 what the allegations are. He's asking for basic facts from the
24 Government. And he mentions, look, those basic facts would be
25 helpful in order for me on behalf of Mr. Hebert to understand

1 whether or not we should be considering an advice of counsel
2 defense. It's not a formal assertion of an advice of counsel
3 defense.

4 Now, Mr. Runkle references the grand jury testimony. I
5 will say that testimony that was taken after Mr. Shiphandler's
6 letter reflects questioning that, to Mr. Runkle's credit,
7 attempts to avoid the disclosure of specific confidences.
8 There are, if I can -- Mr. -- for example, and I don't know if
9 we need to do anything now. I'm about to quote from some grand
10 jury testimony.

11 THE COURT: It's not filed under seal, is it? Is that
12 what you're talking about?

13 MR. LINEHAN: No, no. Well, I'll just go ahead.

14 THE COURT: Okay.

15 MR. LINEHAN: What happens in the grand jury testimony
16 questioning of one of USPLabs employees, Mr. Schwinghammer, Mr.
17 Sullivan asks, "And you've mentioned legal counsel several
18 times." He says, "And I don't want to know, if you've had a
19 conversation, what words were exchanged in that conversation,
20 but have you ever spoken to USPLabs' legal counsel, Peter
21 Hutt?" Answer, "Yes." Which is how Mr. Schwinghammer would
22 know that Peter Hutt was involved with discussions with the
23 company.

24 This is not -- and I raise that because Mr. Runkle seems to
25 suggest that that answer was somehow fed to him. Mr.

1 Schwinghammer clearly had personal knowledge of Mr. Hutt's
2 involvement.

3 Continuing with the testimony, the question is, "You have
4 spoken to him?" Answer, "Yes." Mr. Runkle, "So let's talk
5 about other things." So they're clearly moving away from
6 asking confidences. And I think this reflects the Government's
7 understanding that Mr. Shiphandler did not waive privilege
8 here. They are continuing to avoid getting -- disclosing or
9 having a witness disclose privileged communications on behalf
10 of the company.

11 I would say the -- two more things. I would say that I
12 think we need to understand the distinction between a general
13 waiver and any specific waiver of objection to the taint
14 process. It was a -- the company certainly alerted the
15 Government about a week after the search warrant was executed
16 that there were privileged documents among the seized
17 materials. And the AUSA assured USPLabs that there was a taint
18 process in place.

19 Once we saw evidence that there may have been a problem
20 with the taint process, we raised the issue. We talked to the
21 Government in January. We put our concerns in a formal letter
22 in February. We got an answer four months later. So I'm not
23 sure this is a case of inaction even with respect to
24 challenging the taint protocol.

25 The last point I would make is that with respect to Cy

1 Willson -- and I appreciate Mr. Runkle I guess putting the
2 placeholder as opposed to arguing it in a full-throttle way --
3 that issue has not been briefed before the Court. I would say
4 that, you know, to the extent that there were attorney-client
5 communications disclosed to Mr. Cy Willson, it was certainly
6 with the intent that they would remain privileged and with a
7 state of mind that Mr. Willson was part of the privilege group.

8 So, with that, thank you, Your Honor.

9 THE COURT: Thank you. So, regarding the relief
10 requested in the cross-motion for -- the Government's cross-
11 motion, Document #143, that is denied, denied as premature. If
12 there are -- if there is some further -- or, if there is some
13 actual defense raised of legal advice, acting pursuant to legal
14 advice, then, you know, it'd be appropriate to raise it at that
15 time.

16 I'm not going to go through each of the different reasons
17 that waiver was alleged in this case, but I don't find any of
18 them compelling based on the record that is before the Court at
19 this point, and so the motion is denied. And I'll ask counsel
20 for USPLabs to give -- to submit an order denying that. It
21 doesn't have to be -- go into a lot of detail, but just based
22 on, you know, what was basically stated here at the hearing
23 today.

24 And then let me go back and say, as to the motion for
25 protective order, the Defendant's motion for protective order,

1 I'm denying that as premature at this point too, based on the
2 fact that -- including what I've discussed here, but in
3 particular, that the Defendants have failed to identify any
4 privileged or work product materials -- or potentially, even --
5 that were provided to the prosecution team or the prosecution
6 team actually accessed in this case.

7 I think the five documents that you identified point up
8 basically what I contend, is that when you do specifically
9 identify those documents that shouldn't have been revealed and
10 were protected, then it not only gives an opportunity to
11 determine why and perhaps for the Court to take some action to
12 give you some remedy. And so that's why, I think, that without
13 -- that you've failed in your burden to show good cause for the
14 issuance of a protective order.

15 And like I said, the things that you seek in addition to a
16 protective order -- specifically, that the Government be
17 required to provide you additional information -- I don't think
18 you've shown -- made a showing that there is good cause for
19 that either at this point, under either Rule 16 or the Court's
20 inherent power as it stands.

21 So, now let's go to the USP -- the motion to quash of the
22 Defendants of the subpoena, the grand jury subpoenas issued to
23 USPLabs.

24 MR. LINEHAN: Thank you, Your Honor. Hello again.

25 THE COURT: Yes, sir.

1 MR. LINEHAN: Just for the record, it's Pat Linehan on
2 behalf of USPLabs.

3 Your Honor, the grand jury subpoena at issue in the motion
4 to quash was served in September 2016, which is close to one
5 year after the original filing of the indictment and over three
6 years after the Government executed its search warrants in
7 November 2013. The subpoena seeks documents relating to three
8 specifically-named entities -- PES, Muscle Management, and
9 Royalty Offshore -- and an individual named Josh Pool. None of
10 these entities had any corporate connection to USPLabs, and
11 Josh Pool is neither an employee or owner of USPLabs.

12 Furthermore, the subpoena also requests that -- it requests
13 "any records relating to any other business entity owned or
14 controlled, in whole or in part," not only by USPLabs but any
15 of its principals. In other words, it seeks documents relating
16 to any of the principals' personal business dealings outside of
17 USPLabs.

18 We've moved to quash this subpoena on three grounds.
19 Number one, it's an improper post-indictment use of the grand
20 jury. Two, it's an unduly and burdensome -- unduly burdensome
21 and oppressive measure that distracts from the company's trial
22 preparation efforts. And number three, by seeking documents
23 that are personal to USPLabs' owners and unrelated to the
24 business of USPLabs, it's an improper attempt to subvert the
25 owner-defendants' personally-held Fifth Amendment rights under

1 *U.S. v. Fisher.*

2 I'd like to go to the post-indictment issue first. It's
3 well-settled, Your Honor, that the Government cannot use the
4 grand jury post-indictment to obtain pretrial discovery or to
5 continue its investigations into the allegations that are in
6 the indictment.

7 THE COURT: Of course, they don't contest that. They
8 simply say that, you know, we're investigating other wrongs,
9 which they can do even if it involves the same defendants.
10 Wouldn't you agree?

11 MR. LINEHAN: Well, I think that -- I think that
12 that's their argument. I think it's a pretextual one. I think
13 what's going on here is that they're seeking 404(b) evidence.

14 THE COURT: And I understood that that's what you --
15 your position was, but I was hoping that at this hearing you
16 could give me some evidence that supports your position.

17 MR. LINEHAN: Sure. Okay. Well, let me address the
18 -- because I think they make two arguments here. One is that
19 they're investigating post-indictment conduct, and the other
20 one is that they're investigating something that's unrelated to
21 the indictment. I'd like to think --

22 THE COURT: Or is related to another uncharged entity.

23 MR. LINEHAN: That's right. So let -- I'd like to
24 address that argument first.

25 You know, the indictment, while it may not mention PES or

1 any of these other entities, it does charge the Defendants with
2 -- certain of the Defendants with money laundering. And under
3 that money laundering charge, they allege that the USPLabs
4 Defendants "moved assets through seemingly unrelated shell
5 business entities and concealed the source and nature of the
6 proceeds derived."

7 I would submit that this issue has been investigated and
8 has already -- and the Government has proceeded to indict based
9 on the investigation. I think that this is just -- this is
10 just a -- not an attempt to investigate something -- to the
11 extent this issue is being investigated, it's already been
12 investigated, and I think that if this is looking at uncharged
13 allegations, I think the allegations are -- have already been
14 charged in the current indictment.

15 I don't think it matters that PES or any of the other
16 entities have not been specifically identified in the
17 indictment. The indictment was very general. It talks about
18 seemingly-unrelated shell business entities.

19 And it's also not as if PES was some unknown entity as of
20 late 2016, because there are PES documents in what the
21 Government has already seized. They knew about PES and they
22 could have, you know, they could have pursued an investigation
23 on PES and these other entities, and they did not prior to
24 indictment, or they did and they've come to the conclusion that
25 Count 10 is an adequate manifestation of their investigation.

1 THE COURT: That they could have? Does that preclude
2 them investigating it, though?

3 MR. LINEHAN: Well, I don't think there's an
4 investigation of uncharged allegations here. I think this is a
5 further investigation of a charged allegation.

6 THE COURT: A charged allegation against an uncharged
7 defendant though, right?

8 MR. LINEHAN: Meaning PES?

9 THE COURT: Right.

10 MR. LINEHAN: I'm not aware of who the target of the
11 investigation is, but I know with respect to USPLabs this was
12 clearly an investigation, the product of which were the
13 allegations in Count -- I'm sorry. I said Count 10. I believe
14 it's Count 11.

15 As to the other argument with respect to whether it's a
16 legitimate investigation of post-indictment conduct, you know,
17 I think -- I'd like to just fill the Court in with some factual
18 context here, which is USPLabs was never corporately affiliated
19 with PES or any of the other entities named in the indictment.
20 And with respect to the individual owners, Mr. Doyle and Mr.
21 Hebert relinquished their interest in PES in November 2013, and
22 Mr. Geissler was a passive investor, only a passive investor in
23 PES, had no controlling interest and did not control the
24 operations of that entity.

25 So, you know, that's our factual proffer here. I don't

1 think that there is anything --

2 THE COURT: Well, I don't know how that precludes them
3 from investigating, though. I mean, they have broad grand jury
4 investigative powers. And the fact that, you know, you believe
5 that they're not going to find anything or have anything to
6 indict doesn't preclude them from actually investigating.

7 MR. LINEHAN: Right. And I think I would plainly
8 agree with that in a pre-indictment context.

9 THE COURT: How does that change, though, in a post-
10 indictment context?

11 MR. LINEHAN: Because I think there is the possibility
12 or there is the potential for abuse of the grand jury power
13 when the Government has already indicted a Defendant and
14 continues to use the grand jury to investigate charges --
15 investigate facts that, by the face of the indictment, have
16 already been investigated. You know, I think --

17 THE COURT: Have they submitted a subpoena to USPLabs
18 for the same -- the same *duces tecum* for the same information
19 before this?

20 MR. LINEHAN: No.

21 THE COURT: Is there another subpoena --

22 MR. LINEHAN: No.

23 THE COURT: -- that's been out there? Because you
24 were talking abuses like --

25 MR. LINEHAN: No. There's no USP --

1 THE COURT: -- this is something that's ongoing and
2 they've been doing it, they've been doing it, and --

3 MR. LINEHAN: There's --

4 THE COURT: But it's this one instance, right?

5 MR. LINEHAN: No. Well, they wouldn't need to
6 subpoena anything from USPLabs because as of November 13th they
7 had everything that USPLabs had, at least electronically.

8 THE COURT: But that's who the subpoena is issued to.

9 MR. LINEHAN: That's right. I'm not -- I'm sorry,
10 Your Honor. Maybe I'm misunderstanding your question.

11 THE COURT: Okay. What -- we're talking about the
12 motion to quash the subpoena to USPLabs.

13 MR. LINEHAN: Right.

14 THE COURT: Okay. And you're saying that they are --
15 they could potentially be abusing the grand jury process.

16 MR. LINEHAN: Correct.

17 THE COURT: Okay. And so I'm asking you, are there
18 other instances of them requesting information from USPLabs
19 pursuant to grand jury investigation and subpoena power that
20 would make you think that, or are we only talking about this
21 particular subpoena?

22 MR. LINEHAN: We're only talking about this particular
23 subpoena.

24 THE COURT: Okay. I'm sorry I wasn't saying it --

25 MR. LINEHAN: I'm sorry I was not clear about that.

1 THE COURT: I wasn't clear on what I had said.

2 MR. LINEHAN: So, and the other aspect of the subpoena
3 that suggests that this is not an investigation of an uncharged
4 defendant such as PES is the breadth of the third request. And
5 if you look at the third request -- let me get the language
6 here. The third request -- and I think I've already quoted the
7 language -- but it's any records related to any other business
8 entity owned or controlled in whole or in part by USPLabs
9 and/or any of its principals. And, you know, I think, separate
10 and apart from this being a post-indictment use of the grand
11 jury, I think independently this is the very type of fishing
12 expedition that the Supreme Court warned against in *R.*
13 *Enterprises* (phonetic). And I think, at least with respect to
14 the third request, you know, that would be -- that's an -- it's
15 an overbroad request that's just searching for what we believe
16 is 404(b) evidence that they intend to use at trial.

17 I mean, this -- the other argument, which is sort of
18 separate and apart from the timing of the grand jury with
19 respect to the indictment, is the fact that we are now six
20 months away from trial. And I know this has obviously been
21 several months pending, but, you know, we're significantly into
22 the trial prep process, and this subpoena is going to require
23 USPLabs to take resources, time and resources away where it
24 should be preparing for trial and have to respond to the
25 subpoena.

1 We're right now in the middle of a massive *Daubert* motions
2 practice which has resulted in thousands of pages of documents
3 to review. We've got a three-million-document database. We've
4 got pretrial motions. And, you know, with six months left --
5 and we've got -- and a January 28th deadline, I think this has
6 been and continues to be a threat of an undue burden on the
7 company, on a company that --

8 THE COURT: You know, it's always going to be
9 inconvenient, for sure, but to prove that it's unduly
10 burdensome, you know, the courts usually require something more
11 specific. You know, affidavits that talk about what it's going
12 to take to find the information, you know, what it's going to
13 cost, man hours, woman hours, things like that.

14 MR. LINEHAN: Well, if Your Honor would indulge, we
15 could provide that. We don't have that --

16 THE COURT: Well, you should have already provided
17 that --

18 MR. LINEHAN: We don't have that here.

19 THE COURT: -- because this has been -- you filed this
20 back in --

21 MR. LINEHAN: Fair enough.

22 THE COURT: No.

23 MR. LINEHAN: I do think that, to some extent, that
24 there is a -- it's self-evident --

25 THE COURT: So that's why we're here.

1 MR. LINEHAN: It's self-evident that a three-million-
2 document database and an 11-count indictment is going to expend
3 a lot of the company's resources in a way that may be
4 distracting.

5 THE COURT: Well, that is, but that's not the
6 question. The question is whether we're complying with the
7 subpoena.

8 MR. LINEHAN: Right. So, but my point is I guess, you
9 know, absent actual affidavit evidence, I think that we could
10 -- I think it's fair to say that a company who's facing 11
11 counts -- an 11- count indictment with a three-million-document
12 universe of, you know, record to deal with, and 12 -- you know,
13 20 to 25 experts, I think at this point it presents a threat to
14 and an undue burden. Particularly -- and I think you have to
15 sort of look at the context, which is, you know, which is the
16 other arguments, which is this is a post-indictment subpoena
17 which I think is -- you know, which we believe is a pretextual
18 attempt to get 404(b) evidence.

19 If I can move to the Fifth Amendment issue. I don't think
20 it's a stretch. I think it's well-settled that we've got --
21 that the individual defendants would have an act of production
22 Fifth Amendment right under *U.S. v. Fisher*.

23 THE COURT: But the individual defendants aren't
24 subpoenaed.

25 MR. LINEHAN: That's correct, but they're going to be

1 custodians --

2 THE COURT: So that's --

3 MR. LINEHAN: But they're going to be custodians of --

4 and --

5 THE COURT: That's what happens when you have a

6 company.

7 MR. LINEHAN: Well, if you -- if the -- the case law
8 makes a distinction between U.S. -- between corporate business
9 records for -- business records for which the corporation is a
10 custodian and personal records. If you look at the cases that
11 we cite, --

12 THE COURT: But it didn't look like they subpoenaed
13 any personal records of a defendant. It looks like they --

14 MR. LINEHAN: But they are -- this is a --

15 THE COURT: -- subpoenaed records of the corporation.

16 MR. LINEHAN: It's a three-person LLC, and these guys
17 did a lot of personal business on their USPLabs servers. I
18 mean, this is not a Fourth Amendment issue where the question
19 would be whether or not they have a reasonable expectation of
20 privacy. This is a Fifth Amendment issue. And the fact that
21 -- the fact is they're going to be producing personal records
22 that they have a right not to produce.

23 THE COURT: Are they personal records responsive to
24 the subpoena?

25 MR. LINEHAN: Yeah, for a number -- for the third --

1 the third request requires records relating to any business
2 entities controlled or owned by any of the principals. So it's
3 requiring personal records. And by having to produce these
4 records, the personal -- the individual owners have a Fifth
5 Amendment right at stake here.

6 You know, it's -- we could certainly segregate -- we could
7 certainly separate the universe of personal documents and
8 USPLabs documents. And if the Government is so inclined, not
9 -- I mean, I'm sorry, if the Court is so inclined not to buy my
10 first two arguments, at the very least we can segregate out the
11 personal documents which implicate the Fifth Amendment issue
12 and produce anything that relates to USPLabs' business. I
13 don't think there's going to be a lot in there, based on the
14 factual proffer that we've given you.

15 THE COURT: Okay. I'm having trouble understanding
16 the distinctions here. Okay. The subpoena is for USPLabs'
17 records, not the individual defendants' records.

18 MR. LINEHAN: If I could stop you there to make a
19 clarification.

20 THE COURT: Okay.

21 MR. LINEHAN: The subpoena is for USPLabs' records and
22 personal records that happen to be in the possession, custody,
23 and control of USPLabs.

24 THE COURT: Okay. I overlooked that.

25 MR. LINEHAN: So it's --

1 THE COURT: It said "and personal records"?

2 MR. LINEHAN: Well, if you look at -- if you look at
3 the third request, the third request asks for any records
4 related to any other business entity owned or controlled in
5 whole or in part by USPLabs or any of its principals. So the
6 Fifth Amendment wouldn't be implicated by USPLabs' business
7 records. What I'm saying is that there are personal records in
8 --

9 THE COURT: So the Fifth Amendment privilege would be
10 implicated by having to turn over records that identify any
11 other businesses other --

12 MR. LINEHAN: Any other business entities involving
13 the principals to the company, not the company itself. That --
14 any person --

15 THE COURT: That in and of itself would -- could
16 potentially be incriminating.

17 MR. LINEHAN: The act of that production, because the
18 individual owners will be the effective custodians of the
19 production.

20 THE COURT: Is it just simply because it involves
21 them? Because it seems like the subject matter of it doesn't
22 tend to suggest anything incriminating.

23 MR. LINEHAN: Well, I'm not here to tell you why any
24 particular document that may be in the possession is or is not
25 incriminating, but --

1 THE COURT: And I don't want you to tell me why it's
2 incriminating, but I'm just trying to wrap my own mind around
3 how, you know, how this even implicates a Fifth Amendment
4 privilege.

5 MR. LINEHAN: Well, under --

6 THE COURT: This request.

7 MR. LINEHAN: Sure. So, under *United States v.*
8 *Fisher*, the act of production of a certain document could
9 theoretically be used as a point in the chain of custody or for
10 some other knowledge of the document, or there's a variety of
11 different ways in which the act of production can be a
12 testimonial act. And that's *U.S. v. Fisher*. There's no
13 question about that. That's why these guys weren't subpoenaed
14 personally.

15 THE COURT: But it's the act of production of the
16 subpoenaed entity and it's -- and the individuals acting as
17 custodians.

18 MR. LINEHAN: That's right. So the collective entity
19 exception to the act of production doctrine.

20 THE COURT: Right. So talk about that.

21 MR. LINEHAN: Sure.

22 THE COURT: Because they make a compelling argument
23 that you -- that we don't have that here.

24 MR. LINEHAN: Right. So the collective entity
25 exception to the act of production argument excludes -- from

1 *Fisher*, excludes from the act of production the production of
2 documents by a corporate custodian. That custodian cannot
3 assert a Fifth Amendment privilege because he's acting in his
4 representative capacity.

5 THE COURT: Right.

6 MR. LINEHAN: Okay? So he is producing documents on
7 behalf of the company.

8 THE COURT: Right.

9 MR. LINEHAN: He doesn't have a Fifth --

10 THE COURT: Right.

11 MR. LINEHAN: And the case law is clear that that is
12 with respect to that person's representative capacity and with
13 respect to business -- that company's business records.

14 THE COURT: Uh-huh.

15 MR. LINEHAN: What this subpoena asks for is not only
16 USPLabs' records but personal records of the individual owners,
17 in this case who will effectively be the custodians.

18 THE COURT: Well, but it calls them principals. Do
19 you think that makes a distinction? They're the principals of
20 USPLabs.

21 MR. LINEHAN: Well, there are three principals of USP
22 who are the three defendants here.

23 THE COURT: Uh-huh.

24 MR. LINEHAN: And that's -- and that captures personal
25 documents that are --

1 THE COURT: How does that make them personal, though?

2 MR. LINEHAN: Because these are personal. If they are
3 dealing with entities, they're not dealing with them as
4 entities of their -- of USPLabs. These are personal
5 investments that they're making.

6 THE COURT: Okay.

7 MR. LINEHAN: So I think, you know, the Government
8 makes this argument that the -- that there's -- you know,
9 they're trying to be an alter ego to the LLC, and that's really
10 not the point. The point is these personal documents are
11 different. It's a different ballgame when it's personal
12 documents and the custodian under a *Fisher* analysis is
13 producing documents that are personal to him.

14 THE COURT: Uh-huh.

15 MR. LINEHAN: So, with that, I --

16 THE COURT: Okay. So I guess the distinction is that
17 by personal you don't mean personal so much as not related to
18 USP?

19 MR. LINEHAN: Correct.

20 THE COURT: Okay.

21 MR. LINEHAN: Not personal like I'm talking to my wife
22 or my kids.

23 THE COURT: Right. Right.

24 MR. LINEHAN: Right. Thank you, Your Honor.

25 MR. RUNKLE: Thank you, Your Honor. I'll try to be as

1 brief as possible.

2 I think the -- I'll take the last point first, which was
3 the Fifth Amendment argument. I don't really understand the
4 argument because they are a collective entity. This was the --
5 this is what happens when you form a company. And an LLC is
6 not -- is not actually --

7 THE COURT: I think the last argument, though, was
8 focusing on the actual request, the third request, though, --

9 MR. RUNKLE: Right.

10 THE COURT: -- and the information sought.

11 MR. RUNKLE: And I think, Your Honor, Your Honor
12 construed it correctly in that it asked for documents that are
13 in the possession of USPLabs, the corporate entity. And so if
14 the documents are in the possession of USPLabs, the corporate
15 entity, the entity may produce them to us.

16 If the documents are truly personal documents that are not
17 in the possession of USPLabs, the corporate entity, then
18 they're not covered by the subpoena.

19 THE COURT: Okay. Well, what about the fact that
20 turning them over as custodians of USPLabs, they would
21 basically be admitting that these are the things?

22 MR. RUNKLE: Right.

23 THE COURT: That these are the --

24 MR. RUNKLE: Well, I think that's inherent in the
25 collective entity rule.

1 THE COURT: Uh-huh.

2 MR. RUNKLE: That's -- that's --

3 THE COURT: But when it comes to those specific --
4 that specific subportion of the request, though, --

5 MR. RUNKLE: Uh-huh.

6 THE COURT: -- asking USPLabs for information
7 regarding the principals' participation in other businesses, --

8 MR. RUNKLE: Right. And what protects them from that
9 is that if they were truly personal documents that they didn't
10 comeingle with their work for USPLabs, then they're not --

11 THE COURT: Now, is there some law that talks about
12 them being comingled, though? Because I don't see that cited
13 anywhere.

14 MR. RUNKLE: There is not a law about it being --

15 THE COURT: That something about them waives the fact
16 that -- I don't know if waiver is a good word -- that they
17 would otherwise be not --

18 MR. RUNKLE: Well, that's the possession, custody, and
19 -- I'm sorry, Your Honor.

20 THE COURT: They would otherwise not be USPLabs' --
21 related to USPLabs.

22 MR. RUNKLE: Right. And I think that that's inherent
23 in the possession, custody, and control cases that hold that
24 the entity's legal right to access the documents is what's
25 controlling.

1 THE COURT: And so is it your position that by virtue
2 of them -- because everybody acknowledges that they are the
3 principals of USPLabs -- that by virtue of them using USPLabs'
4 equipment, computer equipment to have, for example, to utilize
5 in some other businesses not related to USPLabs, then USPLabs
6 necessarily has care, custody, and control of that?

7 MR. RUNKLE: I -- I --

8 THE COURT: I mean, in other words, they can't share
9 offices and -- or computers, more to the point, with some other
10 entities they might be involved with?

11 MR. RUNKLE: They could, but --

12 THE COURT: And so what does that mean, though? What
13 does that mean?

14 MR. RUNKLE: Well, that means that it's a -- it
15 depends on the Court's construction of possession, custody, and
16 control. So I could theorize a situation where you would be
17 able to share equipment possibly, but the USPLabs wouldn't have
18 possession of it. But when you're using, you know, ceo@usplabs
19 to send emails about another company, you are exposing that
20 information to the corporation.

21 THE COURT: Well, but then that's USPLabs'
22 involvement.

23 MR. RUNKLE: That's exactly correct, yes.

24 THE COURT: Right. So then the -- or a principal's
25 part is what's the issue.

1 MR. RUNKLE: Right. But I don't believe that it -- I
2 think that it disappears on closer inspection. Yes. I think
3 that disappears upon closer inspection, when you actually take
4 an example like I just gave.

5 So if the email is between Jacob Geissler and John Doyle's
6 personal email accounts, it's theoretically not in the
7 possession, custody, and control of USPLabs. If they send an
8 email about some other entity that they happen to be investors
9 in to their USPLabs email accounts, then it is in the
10 possession, custody, and control of USPLabs. And that's the
11 distinction. I think that distinction is well, you know,
12 understood in the case law, that possession, custody, and
13 control, if you were keeping it --

14 THE COURT: Well, I'm not talking about whether they
15 possess it. We wouldn't be here if they didn't possess it.
16 I'm talking about whether or not they have a claim of privilege
17 to it because it doesn't relate to USPLabs. And does the mere
18 fact that it's on the USPLabs server make it any less so, if
19 it's not related to any business of USPLabs, if they're using
20 it for other businesses, too?

21 MR. RUNKLE: Our position would be that if it's truly
22 on the USPLabs server, then it is in the possession of USPLabs.

23 THE COURT: What do you base that on, though, is what
24 I'm asking.

25 MR. RUNKLE: Well, that's the possession, custody, and

1 control cases.

2 THE COURT: Well, that's not the issue. I mean, they
3 have possession of it. I mean, you go into the -- you know,
4 you go into the -- your response to their waiver thing is that,
5 first of all, the subpoena is to USPLabs for USPLabs'
6 documents. But the subpoena is not just to USPLabs for
7 USPLabs' documents, is the Defense's point. You're asking also
8 for information from the principals --

9 MR. RUNKLE: That's correct, to the extent --

10 THE COURT: -- that doesn't relate to USPLabs. It
11 just happens to be there.

12 MR. RUNKLE: Correct. And that's in the possession --
13 our position is that that's in the possession of USPLabs.

14 THE COURT: Okay. That's two different things.

15 MR. RUNKLE: Okay.

16 THE COURT: Okay. I'm not talking about, okay, you
17 blanketly can ask USPLabs for everything USPLabs possesses,
18 whether it's related to USPLabs or not.

19 MR. RUNKLE: Okay.

20 THE COURT: I mean, they can share this, can't they?
21 Can't they share this computer?

22 MR. RUNKLE: Yes, they can. And they do.

23 THE COURT: So if they share it, then, you know, I'm
24 just trying to see, because it's not like it's a search warrant
25 and, you know, I've left it out there. And that's what I think

1 he was talking about when he talked about not Fourth Amendment
2 rights.

3 MR. RUNKLE: Uh-huh. Oh, I understand that
4 completely. But to the extent that the business is run through
5 USPLabs' documents -- let me give another concrete example. So
6 the PES entity was -- all of its accounting was done by
7 USPLabs' controller, Lonnie Clark. And so these documents are
8 absolutely USPLabs' documents. They are USPLabs' documents
9 created by USPLabs --

10 THE COURT: But then that talks about USPLabs -- then
11 the portion of the request that requires USPLabs would cover
12 that.

13 MR. RUNKLE: Right. Except you just heard Mr. Linehan
14 make what I would consider an absolutely incorrect factual
15 representation, that USPLabs had nothing to do with PES, which
16 is categorically false. And so if their position is that
17 USPLabs had nothing to do with this company, therefore there
18 are no USPLabs documents, that therefore the business is
19 completely separate from the principals, then they have to
20 produce no documents, and that absolutely makes no sense,
21 either.

22 THE COURT: Well, it definitely doesn't based on
23 examples you've said.

24 MR. RUNKLE: Right. And I could --

25 THE COURT: And I don't think -- I don't know. I'll

1 have to ask him if he's contending that, under those examples
2 that you give, that they shouldn't have to produce those
3 documents.

4 MR. RUNKLE: Well, I could give many more. And I
5 wanted to -- I'll go back to the first point, which is that
6 this is a pretextual subpoena. It absolutely is not. I will
7 again lift the veil. We've been doing this for a long time and
8 so I -- we have given them, I think, a fulsome discussion of
9 what is being investigated and I think they can understand it
10 from the subpoenas.

11 What's being investigated, and it's absolutely post-
12 indictment conduct, because, among many, many other reasons,
13 when the indictment happened, national supplement retailers
14 wanted nothing to do with the Defendants and their products and
15 got rid of the products, but nobody bothered to tell those
16 national supplement retailers that these Defendants had created
17 a separate company that they conspired to keep their names out
18 of so that they -- for this exact kind of circumstance, when
19 something happened with USPLabs, they would have some other
20 income source that nobody knew about and that they could
21 continue to draw income from. That's what happened.

22 And so they were trying to not let anyone else know that
23 USPLabs was actually behind this company. And that's why the
24 subpoena language covers -- I believe the subpoena language
25 covers that conduct. And that's where we are, and that's why

1 the subpoena is what it is.

2 And they, in fact, you know, in terms of people that are
3 not in the indictment that the grand jury subpoena covers,
4 there's PES itself, there's Muscle Management, there's, you
5 know, the attorneys at Brewer Lormand, who I think have a lot
6 of questions to answer about what they were doing, you know,
7 keeping these peoples' names out of a company that, you know,
8 and then they could go around and say that it's somebody else's
9 company, it's not theirs. That's the conduct that's being
10 investigated.

11 And Muscle Management was absolutely run through USPLabs'
12 systems with USPLabs' personnel, and it had -- while it
13 ostensibly had other functions, it was part of the USPLabs
14 entity. It's listed on vast numbers of lists of USPLabs'
15 entities that we seized during the search warrant.

16 So to say that there's no connection between them and so
17 they don't have to actually produce anything with the subpoena
18 is just incorrect.

19 To the extent that there are what they claim to be personal
20 documents that were not -- that are in -- on USPLabs' servers,
21 the Government's position is that those are USPLabs' documents,
22 for the reasons that I've said.

23 THE COURT: Okay.

24 MR. RUNKLE: Thank you.

25 MR. LINEHAN: Your Honor, may I?

1 THE COURT: Yes.

2 MR. LINEHAN: I lost my glasses. Sorry. A few quick
3 points. I think Mr. Runkle has mischaracterized what I said.
4 What I said was that USPLabs was not corporately affiliated
5 with any of these entities. That doesn't mean that there
6 aren't any -- any business that's being done between USPLabs
7 and any of these entities. And on this Fifth Amendment issue,
8 I don't think we would consider those documents to be part of
9 my concern about the Fifth Amendment implication here. What I
10 am concerned about is that the subpoena requires the production
11 of the individuals' personal business documents.

12 Maybe I -- let me try an extreme example of this. Let's
13 take a sole proprietorship that asks for business documents
14 relating to Business A, plus let me -- plus I want all the
15 communications about -- between you and your wife. Okay. If
16 he does those emails, this is a single proprietor, works from a
17 single email address and also sends personal things out, I
18 don't think the law requires the production of those personal
19 emails. I think the case law is pretty clear that this applies
20 to business documents. And when someone produces -- and the
21 collective entity exception is that the custodian, when in its
22 representative capacity and producing documents for the
23 business for which they represent, that they represent, that's
24 the exception. The exception is not that custodian producing
25 documents that are personal to him.

1 THE COURT: Okay. What I've decided is that I'm going
2 to have to look at them. So I'm going to deny the motion to
3 quash and I'm going to order the production within -- I'll give
4 you -- how many documents, do you think?

5 MR. GIBSON: Your Honor, may I? This is Mike Gibson
6 for the record.

7 THE COURT: Yes.

8 MR. GIBSON: And I represent Mr. Geissler.

9 THE COURT: Yes.

10 MR. GIBSON: And I've kind of been tasked with this.

11 THE COURT: Okay. Okay.

12 MR. GIBSON: I was going to approach the --

13 THE COURT: Okay. Okay. Go ahead. I'm sorry.

14 MR. GIBSON: No, no.

15 THE COURT: I didn't realize you all were tag-teaming.
16 Go right ahead.

17 MR. GIBSON: I was not trying to be the one to be able
18 to answer that question.

19 THE COURT: Yes.

20 MR. GIBSON: We would ask for, if the Court is going
21 to order production, and especially hopefully for Court review,
22 --

23 THE COURT: Uh-huh.

24 MR. GIBSON: -- I would like -- the original subpoena
25 asked for 45 days.

1 THE COURT: Uh-huh.

2 MR. GIBSON: I would like to ask for 45 days.

3 THE COURT: Okay.

4 MR. GIBSON: And be able to produce it as whatever you
5 order.

6 THE COURT: Okay.

7 MR. GIBSON: And I was going to ask for, and I think
8 that's where the Court is going, for more clarity on Paragraph
9 3 so that I can determine -- because, for example, if Mr.
10 Geissler's personal checkbook is sitting up there in USPLabs'
11 facility, --

12 THE COURT: Well, what would that have to do with his
13 relationship, though, with another entity?

14 MR. GIBSON: It wouldn't have any and so I wouldn't
15 respond or produce it.

16 THE COURT: So you wouldn't need to produce it.

17 MR. GIBSON: But I want to, because it's so vague and
18 a little broad, I don't want to transgress a court order by
19 doing it.

20 THE COURT: Uh-huh. Okay.

21 MR. GIBSON: So maybe that's the point, if we can
22 clarify it or the Court can review it.

23 THE COURT: I don't think you or I would -- or even
24 they would suggest that that would fit under the request. So
25 you're going to have to tell me more about what you think and

1 why it's not clear.

2 MR. GIBSON: Well, if he's running another business,
3 for example.

4 THE COURT: Well, yes, that's the stuff they do want.

5 MR. GIBSON: Well, well, but it's his business and
6 he's selling --

7 THE COURT: Well, that's the question.

8 MR. GIBSON: -- widgets out the door --

9 THE COURT: Well, that's the question, right?

10 MR. GIBSON: -- and it's Geissler Widget Company.

11 THE COURT: That's the question, right?

12 MR. GIBSON: The question is, is that covered by this
13 subpoena? Because he worked at USPLabs and has his business
14 office there that he does other things in, and that's the
15 clarity --

16 THE COURT: Well, that's what we're going about, but
17 I'm denying the motion to quash and I'm going to order the
18 production within 45 days, except that any of the documents
19 that you believe are responsive to the request, however, you
20 have some question of whether they come within this -- let's
21 just call it personal --

22 MR. GIBSON: Yes, ma'am.

23 THE COURT: -- exception as has been argued here, I'm
24 going to require that those in 45 days be produced for *in*
25 *camera* inspection to me.

1 MR. GIBSON: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. GIBSON: Thank you very much.

4 THE COURT: Okay. So I'm going to task you with an
5 order that says that.

6 I'm going to task you with an order that denies the motion
7 for protective order based on what was said here today.

8 I'm going to task USPLabs with an order denying the
9 Government's 143 cross-motion -- and, of course, the record is
10 not saying that, but I'm talking to USPLabs -- for the reasons
11 stated here.

12 And let's see. What was the other one? And then I'm going
13 to task -- did I say the *Brady* motion yet?

14 MR. RUNKLE: Yes. No.

15 THE COURT: Okay. I'm going to task the Government
16 with an order that denies the *Brady* motion for the reasons
17 stated here today.

18 MR. RUNKLE: Yes, Your Honor.

19 THE COURT: Okay. To the extent I said it's denied.
20 You know what I mean. Okay.

21 MR. WEILAND: *Brady* motion, Your Honor?

22 THE COURT: Sir?

23 MR. WEILAND: Do you mean with the exception of what
24 you ordered?

25 THE COURT: With the exception. I said with the

1 exceptions that I've stated here today. I'm just trying to get
2 something in writing, and I'm delegating because Judge Boyle
3 says I should do more of that, to you to memorialize what has
4 happened here today.

5 Okay. Thank you, gentlemen.

6 MR. RUNKLE: Thank you, Judge.

7 MR. WEILAND: Thank you very much, Your Honor.

8 MR. LINEHAN: Thank you for your time.

9 THE COURT: We're adjourned.

10 THE CLERK: All rise.

11 (Proceedings concluded at 12:29 p.m.)

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CERTIFICATE

22 I certify that the foregoing is a correct transcript from
23 the digital sound recording of the proceedings in the above-
entitled matter.

24 **/s/ Kathy Rehling**

07/27/2017

25

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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